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VIRGINIA COLONIAL DECISIONS

VOL. I V. I

THE REPORTS

BY

SIR JOHN RANDOLPH

AND BY

EDWARD BARRADALL

OF DECISIONS OF

THE GENERAL COURT OF VIRGINIA

1728-1741

EDITED, WITH HISTORICAL INTRODUCTION

BY

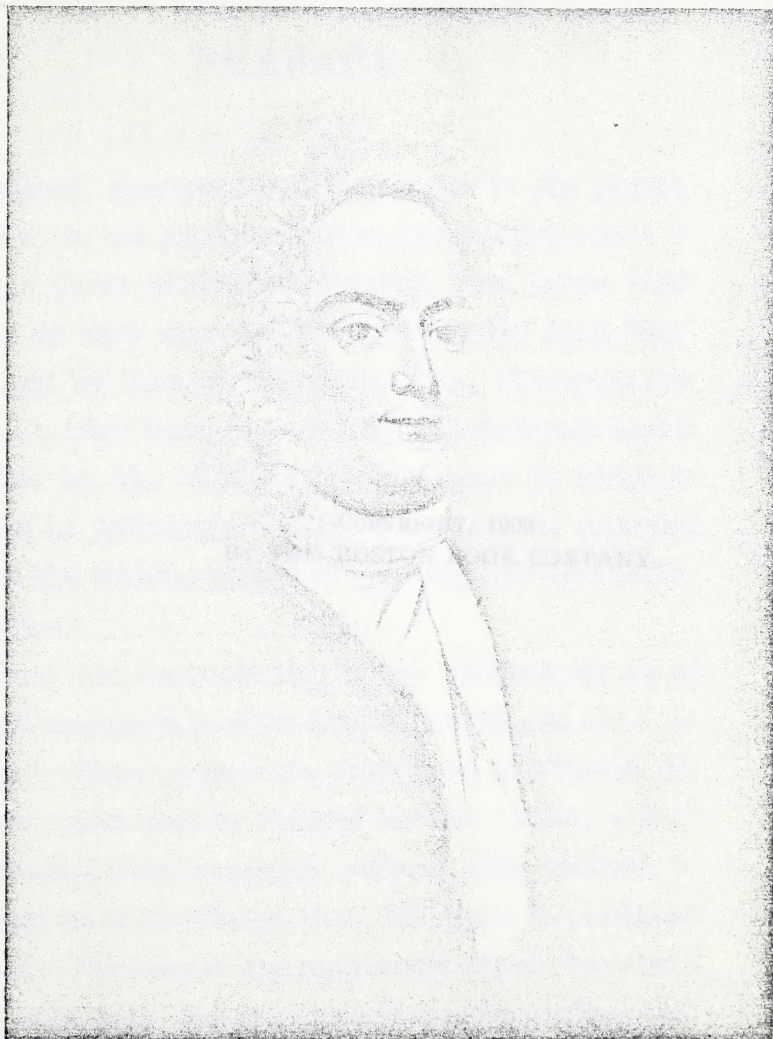
R. T. BARTON

SIR JOHN RANDOLPH

BOSTON, MASS.
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SIR JOHN RANDOLPH

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PREFACE

This book presents in printed form to the public, as well as to the legal profession, the decided cases of the chief Court of Colonial Virginia from about 1729 to 1743, as they were written down by Sir John Randolph and by Edward Barradall, Esq. Except a few cases of a later time, reported by Mr. Jefferson and a very few by Mr. William Hopkins, one of which is included in Jefferson's list, these are all the reported cases of the colonial period of one hundred and sixty-nine years.

It is not that the profession, which makes daily use of the vast multitude of cases decided in the one hundred and thirty-three years of the Statehood of Virginia, by her own courts, and by those of her sister states, and of the United States, cannot do without this addition to their sources of knowledge that this book is published now. Had this been so, the publication would have been made years ago. But it is believed, nevertheless, that the story of the life of the law in the American States will not be completely told so long as there are records of decisions of the highest court of the chief English Colony, preserved only in MS. form, inaccessible to

the profession and to the intelligent general reader, and liable at any time to be destroyed by some mischance, and then, of course, beyond the possibility of publication.

These decisions now printed for the first time are not offered for their *mere usefulness*. To a large extent they will serve that purpose, as the fountains feed the streams; but the reason that they should be published and put in the hands of the general reader, and of students and practitioners of the law, is chiefly that they are the mirror of the events of by far the most interesting period of our American life. These are therefore not merely decided cases to be used as dull precedents with which to win causes. That is their minor function. Their chief use here is the picture they give of the colonial period in all its shades and aspects, and that they make the observer see what the more detailed narrative of history fails to tell, of those brooding times of the States.

Moreover, the publisher has not been content to reproduce simply a statement of the cases, the arguments of counsel, and the decisions of the courts, recorded in these manuscripts near one hundred and eighty years ago. Printed by themselves they do not seem to appeal sufficiently to the imagination to be presented fully in the light in which they should be viewed. For that reason the rather unique, or possibly unconven-

tional, method is put on trial, of accompanying the report of these cases with a perspective sketch of the contemporaneous conditions during the times of the decisions, with some account of the writers of them, and of the lawyers who practised at the bar of the General Court in that day, with the hope of carrying the reader back to colonial times and conditions, and of thereby exciting his greater interest, and enabling him the more easily to absorb what might otherwise perhaps be too dry for intellectual digestion.

So the reports of these cases are offered in this historical setting for the pleasure of the reader, the contemplation of the student and the use of that class of the profession which is not satisfied to let its investigations stop with the newest and freshest cases that drop day by day from the revolving wheels of the appellate courts.

It is therefore modestly hoped that this introduction, which is of greater length than is usual with such publications, will stimulate some appetite for the heavier repast of the reports themselves; and that the graver practitioners of the law will not exclude this book from the companionship of the calf-bound occupants of their shelves, because they may find between its lids such frivolous things as the portrait of a great lawyer, dead near two hundred years ago, and some historical sketches of people and events, in

lighter vein than usually accompany such dry productions as reports of decided cases.

My acknowledgments are due to Mr. W. W. Scott, Librarian of the Virginia State Law Library, for much valuable aid, and to Mr. W. G. Stanard, Secretary of the Virginia Historical Society, the other officials of that Society, the officials of the Virginia State Library and the Library of Congress, and to Dr. L. G. Tyler, President of William and Mary College, and the Rev. W. A. R. Goodwin of Williamsburg, Virginia, for many acts of courtesy.

The copies for the printer, of the Randolph and Barradall MSS., were made in a beautiful hand by Mrs. Claudia Marshall Scott, with wonderful accuracy, deciphering the obscurities of the Randolph MS.

CONTENTS OF VOL. I

PORTRAIT OF SIR JOHN RANDOLPH	<i>Frontispiece</i>
PREFACE.....	Pages iii
GENERAL INDEX	xi
MANUSCRIPT PAGING OF CASES REPORTED:	
By SIR JOHN RANDOLPH.....	xxii
By EDWARD BARRADALL	xxiii
TABLE OF NAMES IN INTRODUCTION	xxv
INTRODUCTION	1-250
CHAPTER I. The Book	1-22
Time of reports and reporters—MSS. from which cases are taken— Story of the MSS.—Search for the originals—Descriptions of the several copies—Jefferson's relations to the reports—Extracts from the MSS., made by him—Conway Robinson and Wm Green—Comparisons of hand writing—Condition of the MSS.— Motive for the Introduction.	
CHAPTER II. The Land	23-42
Early voyages to the new continent—The southward trend— Adventurers to the northward—Gilbert and Raleigh—Roanoke Island—The lost colonists—The settlement on the James—John Smith, his enemies and friends—Smith in Massachusetts—Ex- plorers of the rivers—The beginning of Jamestown—The site as it is—Charters and boundaries—The makers of maps—The Indian names of the rivers—The progress of settlements—The development of trade—The early counties—Huts and man- sions—Across the mountains—Discoverers of the valley—The southwest and Trans-Alleghany—Races of the settlers—Mora- vian missionaries—Visitors to Jost Hite—Washington as a pioneer—The incident of the dead soldier—Speculation and litigation.	
CHAPTER III. The People	43-56
Whites and others—The "poor gentlemen"—John Smith again— King James' folly—Indentured servants—The first slaves—Free and slave population—The cavaliers—Distinguished families— Hugenots—Classes of people—Scotch-Irish—The mountaineers —The "plain people"—Rev. Hugh Jones—Sketch of the colon- ists—Education—Social life—Religious antagonisms—Educa- tion and books—The customs of the country—Houses and furniture—Clothing and food—Amusements—The dresses of the ladies—Occupations of the people—Agriculture and com- merce—Tobacco and iron—Coinage—The people at the capital.	

	Pages
CHAPTER IV. The Government	57-75
Queen Bess and King James—A graphic description—James and the charter—The early plan—The powers of the Council—The guaranty of freedom—End of the oligarchy—The advent of the governor—The one man power—Changes for the better—The first Assembly—The constitution of the legislature—New charters—The veto power—England the pattern—The London Company—The Assembly as a court—The Quarter Court—Trials before the Assembly—Appellate Jurisdiction—End of the London Company—The King and the Company—Rev. Nicholas Ferrar and the Company's books—A copy of the books—The time of the Commonwealth—King Charles II—The loyalty of the people—Cromwell and the Burgesses—The governors of the eighteenth century—Deputy Governors—The Governor and the Assembly—The Quarter and the General Court—The monthly and the county court—Commanders and commissioners—The passing of the county courts—Details as to the Assembly.	
CHAPTER V. The Church	76-112
The Church of England—Early pastors—The early churches—Improvements in them—The oldest tower—The church and social life—Gatherings at the country churches—The belles and the beaux—Fithian and his diary—The Carters of Nomini Hall—Sunday observances—A Sunday dinner—A contrast with New Jersey—The morals of the parsons—Dissent and the church—The Presbyterians—The Scotch-Irish—The tyranny of the church laws—Church and state—Mr. Fithian as a preacher—His mission to the valley—Fithian's views of the people—Denominational differences—The preaching of Whitfield—The "New Lights" and the old—The passing of the old order—The church at Williamsburg—The country churches—Removal of the capital to Williamsburg—A question of advowsons—Governor Nicholson and the vestry—An appeal to law—Commissary Blair—William and Mary College—The Governor's love affair—Commissary Blair as a fighter—The Quakers—Alexander Spotswood—Mrs. Spotswood—Her marriages and posterity—Spotswood crosses the mountain—Bishop Meade on the persecutions—John Holloway—Just before the revolution—The loyalty of the clergy—Their morality—Several accounts—Varying standards.	
CHAPTER VI. The City	113-136
Love for the country—Efforts to build cities—The influences against them—Jamestown as a city—Acts of Assembly to establish cities—Comparative populations of American towns—Trade and commerce—Comparison of the colonies—Colonial cities—Descriptions of Virginia towns—Industrial and commercial conditions—Rivers and roads—Manufactures—Tradesmen and mechanics—Iron making, wool and linen—Williamsburg	

CHAPTER VI—*Continued*

Pages

the city—the pale—The Middle Plantation—The Capitol building—The courts held there—Efforts to remove the capital—The site of the Capitol—Raleigh Tavern—Social life at Williamsburg—George Washington—The vice-royal court—The theatre—Houses.

CHAPTER VII. Education137-153

Sir Wm. Berkeley—Indians and servants—Tutors in families—Public schools—Old field schools—Law students—Educational conditions in Virginia and in New England—Private libraries—The books read—Newspapers—The Virginia Gazette—Marshall's and Jefferson's opinions of newspapers—William and Mary College—Dr. Blair and the governors—Founding and growth of the College—Burning and rebuilding—Distinguished students.

CHAPTER VIII. The Law and the Lawyers154-193

Despotic character of early laws—Concentration of functions in the General Assembly—Effect of the passing of the London Company—Gates, the first law-giver—Draco and Gates—The coming of Delaware—Severe penalties of the law—The reigns of Gates and Dale—Their justification—The judgment of Dale—The Charter of 1619—The reign of law—The early courts—The laws and customs of England—Common law and equity—The effect of English statutes—Some legal opinions—Writ of habeas corpus—Forms of procedure—Entails and the law of descent—Forms of wills—Comparison of colonial and state legislation—Severity and intolerance—Subjects of legislation—Publication of the laws—Abridgements for use—Revisals—Ecclesiastical matters—Divorces—Churches and ministers—Vestries—"Quakers and other recusants."—Blue laws—Intolerance of dissent—Church and state—The early lawyers—Legislative prosecution—Drastic laws—Character of the lawyers—Their unpopularity—Prohibition and regulation of fees—Licenses—Vacillating character of the laws—Penalties and oaths—A conservative conclusion—County court lawyers—The jurisdiction of the courts—Sketches of the reporters—Law students and their education—Examination for licenses—Pettifoggers and sharpers—Sketches of early lawyers—Randolph's sketches of Holloway and Hopkins—Contemporaries of Randolph and Barradall—Attorney-Generals of Virginia—Barradall's kin—The Randolph lawyers—Gabriel Jones—Books used by the lawyers—The printing of the Acts—Collection of the laws—Text books and reports.

CHAPTER IX. The Courts194-225

The monthly courts—Commanders and commissioners—Justices of the Peace—Their appointment and election—History of the County Court—Its jurisdiction, practice, popularity and ending—Juries—Grand juries—Penalties for crime—Clerks of Courts and their elections—The old County Clerk—Character-

CHAPTER IX.—*Continued.*

Pages

istics of the County Court lawyers—A sketch by Dr. Page—Character of Justices of the Peace—Sketch by Judge W. R. Staples—Court day in Virginia—The end of the system—The general court—The councilors—Sessions of the court—Place of session—Number of members—Sketches of the councilors—Character of the councilors—Their appointment—Powers of the governor—Pay of the councilors—Procedure in the General Court—Pleadings—Loss of records of the court by fire—Entries preserved—Original and appellate jurisdiction—A criticism of the court—The effect of the absence of lawyers from the bench—Arguments of the lawyers—Hustings courts—Of Williamsburg and Norfolk—Jurisdiction—Courts of Oyer and Terminer—The case of Talbot—Court held on special commission—Regular terms—The council's jealousy—Conflict as to appointees to hold the court—Commissary Blair in the fight—A compromise—Court held by councilors—Juries and jurisdiction—Court of Vice-Admiralty—Holloway's resignation from—Trial of pirates—Date of this court—The judges—Sessions—The pest of piracy.

CHAPTER X. The Reporters and their Reports 226-250

Dates of births and deaths of Randolph and Barradall—Early deaths—Prevalence of such, and of frequent remarriages—Ancestry of Randolph—Brothers and sisters—Father and mother—Father's distinguished posterity—Sketch of Wm. Randolph of Turkey Island—Education of Sir John Randolph—Legal studies—Home—Marriage—Children—Offices held—Knighted—Ability as a lawyer—Obituary notice—Tablet and inscription—Place of burial—A sketch of his reports—His professional opponents—Comparison with Barradall—Some account of cases reported by him—Technical questions before the General Court—Barradall's parentage—Brothers and sisters—Tombstone—Inscription—A translation—Vestryman—Offices held by—Marriage—Death of wife—His arguments—Compared with Randolph—Cases reported by—Precedents used by lawyers—Motive for reporting.

REPORTS OF SIR JOHN RANDOLPH R1-R114

FORTY-ONE DECISIONS OF THE GENERAL COURT BETWEEN
1728 AND 1732.

TABLE OF CASES REPORTED BY SIR JOHN RANDOLPH R115

CONTENTS OF VOL. II

REPORTS OF EDWARD BARRADALL..... B1-B383

NINETY-NINE DECISIONS OF THE GENERAL COURT BETWEEN
1733 AND 1741.

TABLE OF CASES REPORTED BY EDWARD BARRADALL B385

GENERAL INDEX

ABBREVIATIONS: Figures with "R" stand for paging of Randolph's Reports; figures with "B" stand for paging of Barradall's Reports, Vol. II; figures without a letter stand for paging of the Introduction.

ABATEMENT: plea of infancy, R42.

ACCOUNT: action for, B37; bill for, B34; defendant married to executrix, against, B66; interest not allowed on running, B7, B9, B10, B17, B29; planter and factor, B5; referee appointed in action B37.

ACT OF ASSEMBLY: construction, R42.

ACTIONS: Time within which must be commenced, B372. See Pleadings.

ADVOWSON: right of presentation and induction, B2.

AGRICULTURE: chief business, 55; products of, 54; stock raised, 54; wheat exported, 54.

ALEXANDRIA: early description of, 118; tobacco warehouse at, 118.

APPALACHIAN MOUNTAINS: Byrd's proposal to cross, 36; the crossing of, 36; description of, 35, 38; Smith seeks, 31, 35; Spotswood crosses, 35.

APPEAL: County Court to, 177; general assembly to, 64; general court to, 177; jurisdiction for, B34; London Company to, 64; Privy council to, 64.

ARGUMENT: substance of cases reported, 193; rearguments refused, B43; reports of, in cases, 236, 237.

ASSAULT: compensation no defence, B39; indictment for, B39.

ASSUMPSIT: declaration in, R54; *indebitatus assumpsit*, B52; issue in, R54.

AUGUSTA COUNTY: Moravian Missionaries visit, 38; Scotch-Irish in, 36, 46; early account of Staunton, 38.

BACON, NATHANIEL: rebellion, 29.

BARRADALL, EDWARD: arguments, 248; arms, 245; birth, 2, 244; brothers, 244; cases reported, 1, 4, 12, 248; childless, 243; death, 2, 226; epitaph, 2, 245; family, 246; Fairfax's agent, 15; marriage, 247; mother, 244; offices held 124, 245, 247; opinion by, B31; parentage, 244; pew in church, 93, 247; Randolph, compared with, 248; reports of, 2, 5, 12, 248; sisters, 244, 249; sketch of, 2, 243; tomb, 244; vestryman, 92, 243, 247; wife, 244, 245.

BERKELEY, ROBERT: library, 142.

BERKELEY, SIR WM.: education, on, 137; governor, 68; Green Spring home, 69; newspapers, 137; printing, 137; resigns as governor, 69.

BLAIR, REV. JAMES: burial, 153; character, 99; commissary, 99; controversies, 99; 150; councilor, 210; death, 153; immigration, 99; Nicholas, Govr., and, 151; pugnacity, 99, 150; Scotchman, 98; William and Mary College and, 98, 148, 149; Whitfield and, 88.

BLAIR, JOHN: Judge, 187; sketch, 187; son of Commissary, 187.

BOND: deputy sheriff's, action on, B87; penalty, on, B185.

- BYRD, WM.: age, 210; death, 210; home, 210; library, 144; mines trip to, 103; mountains to cross, 15, 36; sketch, 210; Spotswood and, 103; writings, 36, 103.
- CABOT, JOHN: expeditions, 24.
- CARR, DABNEY: library, 141.
- CARTER, JOHN: books, 141; will, 141.
- CARTER, ROBERT, 1st: books, 2, 141; education, 141; "King," 210; sketch, 210.
- CARTER, ROBERT, 2nd: councilor, 212; governor, 212; sketch, 212.
- CARTER, ROBERT, 3rd: councilor, 212; education, 140; family, 80; father, 212; Fithian's diary, 80; grandfather, 212; library, 140; Nomini Hall, 80; scholarship, 140; wife, 141.
- CARTIER, JACQUES: expeditions, 24.
- CASE: actionable words, R9; escape, for, B185; trespass, R70.
- CASES: Barradall's, 1, 4, 13, 248, B1 to B383; councilors deciding, 210; dates, 1, 237; General Court and, 1; Hopkins', 1, 12; Jefferson's, 1; number of, 1, 10; numbers, 13; Randolph's, reported, 1, 12, 236, R1 to R114; samples, 238; synopses, 4, 236.
- CHAMPLAIN, SAMUEL DE: voyages, 24, 28.
- CHARTER: church provision, 76; crimes, 58; duration, 59; earlier, 28; governor provided, 59; James, King, 57; juries, 58; liberty under, 59; legislature under, 60; money, 58; provisions, 58; punishments, 58, 59; representative government, 62; religion, 58; supervision, 59; taxation, 58.
- CHATTEL: remainder interest in, R36, 87; limited use of, R22; slaves as, R39.
- CHURCH: advowsons, 93; attendance, 79, 168; Bruton, 91; building, 78; commonwealth, during, 168; controlled by legislature, 167; condition after revolution, 111; charter provision, 76; clergymen, 76, 82; description, 80; disestablishment, 110; dissent, 83, 169.
- CITY: act establishing, 114, 115; building act, 114; commerce, 117; conditions affecting, 117; early towns, 117; encouragement, 113; 114; failure of, 115; forced by law, 114; Jamestown, 114; King's wishes, 114; nature's opposition, 116; planter's opposition, 114, 117; prices and penalties, 115; trade affecting, 117.
- CLAYTON, JOHN: ancestry, 185; education, 185; offices, 185.
- CLERGYMEN: advowsons, 93, B2; character, 82; commonwealth, during, 168; early ministers, 76, 82; education, 168; laws about, 168; loyalty, 105; morals, 108; Nicholas, Govr., 100; Presbyterian, 106; salaries paid in tobacco, 39; salaries, to be levied for, B29; Whitfield, 89.
- COCKE, WM.: sketch, 210.
- COLUMBUS, CHRISTOPHER: birds, 23; discoveries, 23.
- COMMANDERS OF PLANTATIONS: justices, 73; courts, 72.
- COMMERCE: early, 54; imports and exports, 119, 120; products, 54; prior to 1800, 117; tradesmen, 119; wheat exported, 54.
- COMMON LAW: formal adoption in Virginia, 162; previously prevailed, 162; principles of and of equity followed, 159.
- CONDITIONS: estate on, R20, 65, 84, B81; contingent fee, B195; distinctions as to future events, R104.
- CORTES, HERNANDO: expedition, 24.
- COUNCILORS: appointment, 212; commonwealth time, 213; court, 208; governors and, 212, 213; pay, 214; privileges, 214; sketches, 210.

- COUNTIES: courts in, 71, 72; establishments, 72; Hundreds, 72; map, 34; named, 70; shires, 72.
- COUNTY CLERKS: appointment, 200; character, 201; importance, 201.
- COUNTY COURTS: abolition, 73; appeals, 177; charter, 73, 196; clerks, 200; common law, 198; constitution, 195; court-day, 205; crimes, 197; end of, 207; divorce, 168; established, 72; English counterpart, 197; equity, 198; fiscal feature, 73, 197; informality, 199; information against for not keeping sufficient prison, B37; juries, 109, 197, 199; jurisdiction, 197, 198; justices, 195, 196, 197, 205; lawyers, 176, 201, 202; members, 196; monthly, 71, 72, 194, 197; named, 72; origin, 194; penalties, 200; president, 199; popularity, 73; quarterly, 197; sessions, 197, subsidence, 207.
- COUNTY SYSTEM: acts of assembly, 63; buildings, 125; commanders, 72, 194; county, 72, 194, 196; division, 159, 194; English laws, 159; general, 71, 125, 208; General Assembly, 13, 63; Hustings, 219; jurisdiction, 197, 208, 217, 219; justices, 159, 195; lawyers, 171, 218; martial law, 125; monthly, 71, 72; Oyer and Terminer, 125; 219; sessions, 125; Quarter, 71; Vice-Admiralty, 219.
- COVENANT: action of, R57.
- COVERTURE: savings of statute of limitations, R10.
- COXE, BRINTON: MS. presented, 7.
- CRIMES: charter, 58; courts to punish, 159, 200; jurisdiction of General Assembly, 63; Oyer and Terminer court, 221; penalties, 58; 157, 200, 217; rape, 200; pardon, 59; pirates, 222, 223.
- CUSTIS, JOHN: sketch, 211.
- CUSTOMS: amusements, 49, 51, 53; currency, 53; duty on slaves sold, B38; duty on tobacco, B25; hospitality, 50; intolerance, 84; paternalism, 56; persecution, 84.
- DAMAGES: *indebitatus assumpsit*, in, B52; writ of enquiry for, R78.
- DANDRIDGE, WM.: sketch, 212.
- DARE, VIRGINIA: disappearance, 25; parentage, 25
- DAVIES, REV. SAMUEL: cane and wig, 110; pastor "Timber Ridge" church, 110.
- DEBT: action on bond, R56; arbitration bond, on, B129; another, action for, B39, 136; bond with condition on, B55; escape for, B64; personality first liable, R83; personal representatives, B239; refusing an office for, B40; usurious interest, action for, B201.
- DECLARATION: *assumpsit*, R54; consideration in, R76; deceit, in action for, R7.
- DEED: acknowledgment, R51, 111; after acquired property, B78; infant by, R77; married woman, by, B93, 180; voluntary, R59; will compared with, R95.
- DEMURRER: bill, to, B40.
- DEMURRER TO EVIDENCE: joinder in, compelled, B43.
- DESCENT and DISTRIBUTION: half bloods, between, B31; lands, 58; law of, B31: slaves and personality, B31.
- DE SOTO, JUAN: expedition, 24.
- DETINUE: Chest of medicines, B43; increase of slaves, R35, B71; remainder in slaves, B52, B56.
- DIGGS, COLE: sketch, 211.
- DISABILITIES: infancy, R10; coverture, R10, 33.

- DISCOVERERS: birds, 23; Columbus, 23; Cortes, 24; Cabot, 24; Cartier, 24; Champlain, 24; DeSoto, 24; Gilbert, 24; Grenville, 24; Hudson, 24; Ponce de Leon, 24; Vespucci, 24; early voyages, 24; northern voyages, 24; Pizarro, 24; southern track, 24.
- DISSENTERS: churchmen and, 89; persecutions, 83; Presbyterians, 83; spread, 83, 89.
- DIVORCE: absolute, none, 168; *a mensa et thoro*, 168; General and County Courts granted, 168; marriages annulled, 168.
- DOWER: devise in lieu of, B67.
- DRAKE, SIR FRANCIS: voyages, 25.
- DUNMORE, LORD: dissolves the Burgesses, 129; governor, 129; Raleigh tavern protest, 129.
- EDUCATION: apprentices, 138; books, 141, 144; Berkeley on, 137; negroes, 128; college, 137; field schools, 138; gifts made for, B363; Indians, 137; Jones' account, 49; lawyers, 139; libraries 140, 144; newspapers, 137; public schools, 138; tutors, 138; sons to England, 139.
- EJECTMENT: accretions, for, B117; limitations to action, R10, 52; special verdict in R15; term expired, rights, B60; will construed in, R55.
- ELIZABETH, QUEEN: death, 57; Gilbert and, 24; Virginia named, 25.
- EQUITY: jurisdiction, R63; specific performance, R46; statute of limitations, R63; marriage bond in suit on, R58.
- ESTATE: conditional, R20, 36, 65, 84; Contingent fee, B195, 320; entailed, R40, 49, 93; joint tenants, R30; life or fee, R17, 37, 42; limitations over, B251; remainder, R40, 69; repugnancy, R66; survivorship, R32; tail, B111, B85, B150, 304, 310; tenants in common, R33, 34.
- EVIDENCE: affidavit rejected, B81; bastardy rule as to, B161; incompetency of interested party, B51; seating of land, proof, B45.
- EXECUTOR: devastavit by, B239.
- FAIRFAX, THOMAS LORD: Barradall agent, 15; books, 144; letter, 15; surveys, 39; Washington and, 39.
- FAIRFAX, SIR WM.: Letter, 15.
- FELONY: Estray stolen not, B92; indictment for, B90.
- FITHIAN, PHILIP VICKERS: Tutor for Carters, 80, 140; Carter library, 140; diary, 80, 181; opinions of people, 87; Sunday observance, 81; preaches in the valley, 87; social life described by, 80; visits Winchester, 87.
- FITZHUGH, WM.: books, 142; education of sons, 142; granddaughter, 141; lawyer, 159, 179; opinion on English Statutes, 159; sketches of, 179, 245.
- FITZHUGH, HENRY: brother of Barradall's wife, 142; books, 142.
- FRAUD: action for in sale of slave, B45; patent affected by, B166.
- FREDERICKSBURG: early description, 118; tobacco warehouses, 118.
- GENERAL ASSEMBLY: acts to be approved, 61; acts made public, 166, 190; appeals, 64; burgesses, 61, 74; capitols, 123, 124; chosen how, 74; church place of first session, 78; church regulated by, 168; composition of, 61, 64; council part of, 61, 62; court's power over, 63; court, sat as, 13, 63; crimes punished, 64; Cromwell's time, 69; dissolution, 129; Dunmore and, 129; English forms, 62; English law, 159; first assemblage, 60; governor's part, 61; jurisdiction, 61, 62, 63; members, 74; paternalistic laws, 163; penalties imposed,

GENERAL ASSEMBLY—*continued*

64; publication of acts, 166, 190; revolutionary movements, 129; revisals of acts, 166; sessions, 74; subjects of legislation, 164; trials before, 64; veto power of governor, 62.

GENERAL COURT: appeals, 177; arguments, 218; chief tribunal, 208; common law, 217; composition, 208; council became, 71; criminal jurisdiction, 208, 217; divorce, 168; English law, 217; equity jurisdiction, 217; forms for procedure, 208, 214; juries, 217; jurisdiction, 208, 217; lawyers, 176; name changed, 208; number, 209; opinions, 218; penalties, 217; place of session, 209; pleadings, 215; proceedings, 208, 214; Quarter, 209, 214; records, 208, 209; sessions, 208, 209; time of sitting, 215; sketches of members, 210; terms, 209.

GILBERT, SIR HUMPHREY: death, 25; expedition, 24; Elizabeth's message, 24; Sir Walter Raleigh's brother, 24.

GOSNOLD, BARTHOLOMEW: vessel commanded by, 26; wisdom, 26.

GOVERNMENT: charters, 28, 58; council, 58; Cromwell, under, 67, 69; governors, 61, 62, 68, 69, 70; general assembly authorized, 60; habeas corpus, 102, 162; London company, 64; representative government, 62, 68; taxation, 58.

GOVERNOR: appointment, 68, 69; appointing power, 200; charter power, 59; commonwealth time, 213; councilors and, 212, 213; council, head of, 61, 71; counties named after, 70; Cromwell, under, 69, 213; deputy, 70; judicial functions, 208, 209; veto power, 62.

GRAHAM, REV. J. R.: loyalty of clergy, 106; Presbyterianism, 106

GREEN, WM.: books, 6; manuscript, 6, 7; notes, 5, 10, 17, 19; sale, 7.

GRENVILLE, SIR RICHARD: expedition, 25.

GRYMES, JOHN: sketch, 212.

HABEAS CORPUS: formal adoption in Virginia, 162; right to domicile in Virginia, 102; Spotswood brings the writ, 102, 162.

HARRISON, NATHANIEL: sketch, 211.

HARVARD COLLEGE: manuscript, 7.

HENRY, WM. WIRT: defence of Smith, 27; eulogy of Smith, 27; Pocohontas' story, 26.

HEIRS: ancestor's debt, liability for, B192, 229; words of purchase, R111; words of limitation, B85.

HITE, JOIST: dead soldier, 41; home, 41; missionaries visit, 37; name, 38; sketch, 38; Washington visits, 39.

HOLLOWAY, JOHN: character 181, 182; lawyer, 179; offices, 182; opinion by, B29; Randolph's sketch, 180.

HOPKINS, WM.: death, 182; lawyer, 180; manuscript, 1; Randolph's sketch, 182; reports 1, 12, 184.

HOUSES: description, 52; furniture, 52; libraries, 52; material, 52; on the rivers, 34; rooms in, 52; Williamsburg, in, 121.

HUDSON, HENRY: expedition, 24.

HUNDREDS: divisions so called, 72.

HUSTINGS COURT: jurisdiction, 219; Norfolk, 220; Williamsburg, 219.

INDIANS: preachers to, 58, 76.

INDICTMENT: assault for, B39; felony, for, B90, 92; sufficiency, R30.

INFANTS: deeds, R77; savings of statute, R10; wills, R33, 77; plea, R42; seating of land by, B174.

- INTEREST:** on legacy, R104; payment released by circumstances, B29; running and stated accounts, B7, B9, B10, B17, B29; usury, B201.
- IRON WORKS:** laws regulating, 120; methods crude, 120; ore beds, 120; Spotswood's enterprise, 36; unsuccessful, 55, 120.
- ISSUE:** dying without, R86; pleadings, in, R14, 42, 77, 54, 56, B117; word of purchase or limitation, B85.
- JACKSON, STONEWALL:** type of Scotch-Irish, 85.
- JAMES RIVER:** chart, 31; explorations, 28; Indian names, 28; settlements, 34.
- JAMES, KING:** charters by, 28, 58; death of, 67; description, 57; despotic tendencies, 67; instructions drawn by, 28.
- JAMESTOWN:** abandonment, 119; burning of, 29; church at, 30, 77; city by law, 114; date of settlement, 29; General Assembly, first at, 29; location bad, 29; restoration, 30; removal of capitol, 92; site selected, 29; settlement at, 29; story of, 29; statue of Smith, 30; State House, 30; Tyler's story of, 29; village always, 117; Wise's eulogy, 29.
- JEFFERSON, THOMAS:** ancestry, 45, 207; capitol described by, 128; cases reported by, 1, 9; children, 187; dances with Belinda, 131; extracts from MSS. by, 9; father-in-law, 187; law student, 131; marriage, 187; MSS. used by, 8; MSS., account of, 8; newspapers, views of, 147; reports by, 1, 9.
- JOINT TENANTS:** estates to, R30; survivorship, B140.
- JONES, GABRIEL:** aids Washington's election, 132; character, 189; education, 139; lawyer, the, 139; sketch of, 188.
- JONES, REV. HUGH:** capitol described, 124; conditions described, 47; palace described, 133; people described, 38; sketch of, 47.
- JUDGMENT:** arrest of, B34; confession of, B33.
- JURIES:** charter provision, 58; county courts, in, 197, 199; General Court, in, 217; grand juries, 200; selection, 199; trials by, 197, 199.
- JUSTICES OF THE PEACE:** appeals from, 197; chosen, how, 195; commanders compared with, 73; county courts, in, 195, 205; election of, 196; first known as such, 73; monthly courts held by, 195.
- LAND, THE:** birds of, 23; debts, liable for, B105; descent, 58; difficulties in reaching, 23; discovery, 23; early voyages to, 24; Florida settlements on, 24; more or less sale, B123; northern voyages to, 25; rivers in, 33; seating, effect of, B45; Shenandoah Valley, 34; southern track, 24; speculations in, 41; Southwest Virginia, 36; superstitions about, 23; trees as marking boundaries, B10.
- LAW:** administration of, 157; books used by lawyers, 167; charters under, 158; church, acts concerning, 167; community of goods, 58; courts, the, 63, 72, 159, 71, 197, 219, 15, 125; common law in the colony, 162; common law and equity, 159; crimes, 156; descents, 163; early administration, 60; entails, 163; English model, 159, 217; English, bound by, 159, 217; Gates, under, 155; habeas corpus writ, 162; improvement in, 158; iron making regulated by, 120; lawyers regulated by, 171; marriages, of, 168; money regulated by, 163; paternalistic character, 163; pleadings at, 177; prices fixed by, 164; revisals of, 166; severity of, 156, 157; study of, 139; tyrannical, 60.
- LAWYERS:** books used by, 165, 178, 189; county courts, in, 176, 201; character of, 170, 179; compensation of, fixed, 172; eminent lawyers, 179, 187; fees fixed by law, 56, 172; fees taxed costs, B45; forbidden to practice, 172; General Court, in, 176; licenses of, 171; list of, 186; mercenary, 172; oaths required, 172, 176, 177; reasons for regulating,

LAWYERS—*continued*.

171, 173; regulated by law, 171; reports used, 189; legislated about, 171; sketches of, 179, 187.

LEASE: assignment, R73.

LEDERER, JOHN: sketch of, 36; Shenandoah Valley, in, 36.

LEE, ROBERT E.: ancestry, 45, 211; type of older stock, 85.

LEE, THOMAS: sketch of, 211.

LEGACY: conditional, R103, 106; interest on, R104; legatee preferred to remainderman, R104.

LEGISLATURE: (see General Assembly) charter powers, 60; first in America, 29, 60; Jamestown, at, 29; seats denied members, 34.

LEWIS, JOHN: sketch of 210.

LIGHTFOOT, PHILIP: sketch, 211.

LODGE, HENRY CABOT: attacks on clergy, 106; lawyers, opinions of, 179; writings of, 107.

LONDON COMPANY: appeals to, 64; books and papers preserved, 66; colony established by, 58; free government by, 64; history of, 65; passing of, 65.

LUDWELL, PHILIP: abridgement of laws by, 165; ancestry, 210; councilor, 210; sketch of, 210.

MANUSCRIPTS: account of, 1; age, 17, 19; authority, 5; Barradall's, 2, 13; black letter, 20; cases, 1, 4, 12, 13; complete, which, 8; Congressional Library copy, 13-20; conditions, 2, 17, 19; copies, 2, 6; Green's copy, 7, 17; Harvard copy, 7, 19; handwriting, 2, 11, 15, 20; history of, 5, 6, 8; Historical Society copy, 14, 17; Hopkins', 1, 12; identity, 6, 10, 11, 20; index to, 11, 14; ink, 20; Jefferson's use of, 8; Jefferson's narrative about, 8, 11; Law Library copy, 5; loss of pages, 17, 18, 21; Myers' copy, 10; notes to, 5, 7, 10, 17, 19; obliteration, 2; origin, 5; originals, search for, 8, 10, 11, 14; obscurities in, 2; paging of, 7, 12, 18; Randolph's, 2, 13; Robinson's copy, 2, 5, 7, 12; tests of, 10, 11, 14, 20; Virginia Historical Society copy, 14, 17; Virginia State Law Library copy, 2, 5, 7, 12.

MARRIAGES: annulled when, 168; confusion resulting from remarriages, 238; divorce, 168; estates, R99; frequency of, 226; laws regulating, 168; property rights, 238, R110, B107 short intervals between, 238; suits caused by, 238; wife sister invalid, B18, B20; void, when, R55.

MARRIED WOMEN: deed, R51, R111, B93; estate, R99; debts, liability for, R99, R100; husband's property rights, R110, B107; savings to statute of limitations, R52; separate estate, B294; trust estates, R110.

MARSHALL, JOHN: ancestry, 45, 227; church affiliations, 111; opinion of newspapers, 147; student of law, 153.

MARYLAND: carved from Virginia, 31.

MARY, QUEEN: contribution to college, 150; Elizabeth, the enemy, 57; James, son of, 57.

MASON, GEORGE: ancestry, 45; time of, 9.

MASSACHUSETTS: Smith's voyages to, 27, 28; praise of, by Smith, 27.

MEADE, RT. REV. WM.: builder of church, 112; clergy's loyalty, 107; persecutions, on, 103.

MERCHANTISE: country stores, 115, 116; importations, 53.

MIDDLE PLANTATION: see Williamsburg.

MONEY: coinage, 58; coins used, 55; differences in values, 55; foreign, 55; prices affected by, 55; regulated by law, 163; tobacco used as, 55.

- MORAVIAN MISSIONARIES:** account of country by, 38; Episcopal minister, account of, 39; Hite, visits to, 38; Presbyterians and, 38; Shenandoah Valley, in, 37; Scotch-Irish, and, 38; Thompson, Rev. John, and, 39; Waddell's note about, 38; Winchester visited by, 38.
- MYERS, H. H. B.:** note of, as to MS., 11.
- NEEDLERS, BENJ.:** sketch, 186.
- NEWPORT, CHRISTOPHER:** explores the river James, 28; fleet of, 26.
- NEWSPAPERS:** absence of, 50; advertisements, 145, 148; Berkeley on printing, 137; colonies, in the, 145; contents of, 145; description of, 145, 147; first in Virginia, 145; Jefferson's opinion of, 147; printing of, 145; Marshall's opinion, 147; publishers of, 146; truthfulness of, 147; Virginia Gazette, 146, 147.
- NICHOLAS, PHILIP CARY:** copy of MS. by, 3.
- NICHOLSON, GOV. FRANCIS:** advowson controversy, 93; Blair's controversy with, 151; character, 100; love affair, 99; removal, 100; sketch, 99; William and Mary College and, 99; Williamsburg's streets named for, 124.
- NORFOLK:** advantages, 117; chief city, 117; Hustings court, 220; population, 117; revolution, before, 118.
- NORTH CAROLINA:** carved from Virginia, 31.
- OPINIONS:** by Barradall, B31; Chesshyre, B9, 16; Dee, B10; Hinchman, B5; Holloway, B29; Jones, B1; Mead, B21; Northey, B2, 4; Paul, B18; Pigot, B17; Powys, B7; Raymond, B5, 9, 26; Reeves, 10, 16; Randolph, B29; Strahan, B20; Stanyan, B22; Thomson, B29; Thomson, Sir Wm., B10, 22; Yorke, B25.
- OYER AND TERMINER COURT:** composition, 221, 223, 224; claim of the councilors, 222; disputes about, 222; jurisdiction, 223; pirates tried in, 223, 224; terms of, 222, 223.
- PAGE, MATHEW:** sketch, 211.
- PENALTIES:** county court by, 200; general court by, 64; general assembly by, 63; life or limb, 200; Oyer and Terminer court, 221; pirates, on, 222, 223; rape, for, 200; slaves, imposed on, 200.
- PENDLETON, EDMUND:** distinction of, 187; license to practice law, 187.
- PEOPLE, THE:** cavaliers, 45, 46; convicts among, 44; church attendance, 79; early deaths, 226; early marriages, 226; education, 49-50, 137; first settlers, 43; Fithian's opinion, 87; families, 45; Germans, 36; Huguenots, 45; indentured servants, 44; Jones, Rev; Hugh, describes, 47, 135; land owners, 46, 50; loyalty of, 68; marriages, 226, 238; maidens imported, 44; newspapers, 50, 145; occupations, 54, 55; planters, 49; poor gentry, 43; religions, 89; Scotch-Irish, 38, 83; slaves, 44; small landowners, 46; Washington's opinion of some Valley settlers, 40.
- PERSONAL ESTATE:** primary fund for debts, R82, B105; exhausted before slaves sold, R82; life estate in, R109.
- PETERSBURG:** early description, 118; tobacco warehouse, 118.
- PIZARRO, JOSE ALFONSO:** expedition, 24.
- PLANTERS:** amusements, 49, 51, 53; beds, 52; clothing, 51, 53; church attendance, 79; country life, 117; city question, 113; dress of men and women, 53; education, 50; family, relations, 51; furniture, 52; home life, 51; hospitality, 51; horses, 50; houses, 52; libraries, 52; life among, 49; musical instruments, 53; patriotism, 51; portraits, 52; purchases by, 119; religion, 50, 51; shippers, 119; social life, 51; sports, 51; wine drinkers, 51.

- PLEADINGS: abatement, R42; assumpsit, R14; demurrer, R77; former judgment, B117; issues, R54; next friend, B256; *nil debet*, B64; non assumpsit, 77; pleas, R56; *plene administravit*, B155.
- POCAHONTAS: Henry's defence, 26; rescue of Smith, 26.
- PONCE DE LEON, JUAN: expedition, 24; Florida settlement, 24; St. Augustine, 24.
- PORTEUS, ROBERT: sketch, 211.
- POWHATAN: description, 33; river so named, 28.
- PRESENTMENT: obstructing the King's highway, B19.
- QUAKERS: persecution, 101, 103; Spotswood's course, 101.
- RALEIGH, SIR WALTER: expeditions, 25; Roanoke settlement, 25; Virginia named by, 25.
- RANDOLPH, EDMUND I.: attorney-general, 188; death, 188; distinction, 188.
- RANDOLPH, GEORGE: proposed publication by, of Barradall's reports, 5.
- RANDOLPH, JOHN: attorney-general, 8, 188; burial of, 188; death 188; MS. owned by, 8, 11; parentage, 188; revolution, his course towards, 188.
- RANDOLPH, PEYTON: death, 188; lawyer, 188; sketch of, 188; time of, 9.
- RANDOLPH, SIR JOHN: ancestry, 226, 229; birth, 2, 92, 226; character, 231; cases reported by, 1; children, 228; death, 2, 229; debater, 237; education, 228, 231; epitaph, 233; funeral, 229; knighted, 228, 229; lawyer, 8, 178, 179, 226, 277; marriage, 228; offices, 124, 228; opinion by, B29; reports, 1, 236, R1 to R114; pew, 93; sketches by, 180; sketch of, 226; tablet to, 233; vestryman, 93.
- RANDOLPH, WILLIAM: ancestry, 227; character, 227; distinguished posterity, 227; marriage, 227; offices held by, 227; sons and daughters of, 27; Turkey Island, 227; wealth, 227.
- REAL ESTATE: personal first liable for debts, R83.
- RECORD: purchase affected by, B129.
- RELIGION: clergymen, 82, 107; compulsory, 50; Fithian's account, 80; forms required, 58, 76; denominations, 89; Indians, 58; loyalty of clergy, 107; morality of clergy, 82, 108; persecutions, 84, 85, 101, 103; Presbyterians, 83; standards of, 110; Whitfield's preaching, 80.
- REMAINDER: construed, B40; increase of slaves, in, B29; legatee preferred to, R104; in personal property subject to a life estate, B29, B56.
- REPORTERS: arguments, 218; cases, 12; environment, 21; Jefferson's account, 8; MSS., 2; names, 1, 226; sketches, 266; Edward Barradall, sketch of, 243; Sir John Randolph, sketch of, 226.
- REPORTS: arguments, 236-242; Barradall's, 1-5, B1-B383; English form, 276; Hopkins', 1; Jefferson's account, 8, 11; plan of, 4, 236; reasons for publishing, 250; Randolph's, 1, R1-R114; samples of cases reported, 232; style, 236; subjects, 237; synopses, 4; writing, 249.
- RIVERS: commerce on, 33; Chickahaminia, 32; Elk, 32; highways, 33; James, 32, 34; Ohio, 84; Pamaunkee, 32; Potowmeke, 32; Powhatan, 28; Payankatanke, 32; Rappahannock, 34; Sassafra, 32; Sasquahanough, 32; settlements on, 33; Shenandoah, 38; Shipping on, 33; Toppahanock, 32; vessels on, 33; voyages of Smith, 32, 33; wharves, 33; York, 34.
- ROANOKE SETTLEMENT: abandonment, 25; Dare, Virginia, 25; romance of, 25; settlement, 25.

- ROBINSON, CONWAY: story of his MS., 2, 5, 7, 12; reports, 5.
- ROBINSON, WILLIAM: sketch, 212.
- SCOTCH-IRISH: Augusta Co., 38, 46; character, 42; Moravian missionaries and, 38; settlements by, 38, 86, 87; Shenandoah Valley and, 38; southwest and, 42; Stonewall Jackson, 85.
- SCOTT, W. W.: copies by, 2; notes of, 4.
- SETTLEMENT: causes of, 28; cities, 33; date, 28; growth, 34; limits, 31; maps, 34; progress, 33, 34; rivers, 33, 35; site of Jamestown, 29.
- SHENANDOAH CO.: named, 70.
- SHENANDOAH VALLEY: Byrd's proposal to cross mountains, 36; earliest settlers, 36; early grave in, 36; Scotch-Irish, 38; diary, 34; early visitors to, 37; Fithian's visit, 118; Germans, 36; Lederer, claims of, 36; Moravian missionaries, 37; Presbyterians, 86; settlement, 36; Spotswood enters, 36; Washington in, 37.
- SHERIFF: action on bond of deputy, B87, B157; escape, action for, B64, 80, B64; judgment and attachment against, B80; action against, for discharge, R78.
- SHIRES: divisions called, 72.
- SLAVES: barbers, 120; duty on sale of, B38; execution on increase, R39; increase of devise, R35; detainee for, B71; executor responsible for increase, R81; increase of, 45; penalties imposed on, 200; real estate, when held as, R39, 82, B372, 289; sales under execution, R61, 62; successive estates in, R61; other personality first applied to debts, R82; mechanics, 119; introduced first, 44; suits about, 239.
- SMITH, JOHN: admiral of New England, 27; credibility, 26; defence, 27; descriptions by, 33; eulogy, 27; explorations, 32, 33; founder, 27; maps of, 28, 31, 33; Massachusetts, in, 27, 28; mountains, 31; New England voyages, 27, 28; Pocohontas and, 26, 27; rivers, on, 31, 32; statue of, 30; voyages, 31, 32; writings, 26.
- SPOTSWOOD, ALEXANDER: age, 102; Blair and, 103; Byrd and, 103; crosses the mountains, 35, 103; college, 153; iron works, 36; governor, 102; Knights of the Golden Horseshoe, 35; marriages, 102; palace for, 102, 134; Quakers and, 101; soldier, 102; widow remarries, 39.
- STATUTE OF LIMITATIONS: actions, for, B372; adverse possession, 51, B272; bill of exchange, B51, 80; ejectment, R10; entry, R52, 64; coverture and infancy, 10, 54; legacies, R63; state claims, B232.
- STAUNTON: "Augusti Courthouse" 38; early account of, 119; roads, 38.
- SUBSTITUTION: on payment of an execution, R81.
- TAYLOE, JOHN: sketch, 211.
- THOMAS, R. S.: clergy's loyalty, as to, 106; clergy's morality, 108; oldest church, 78.
- THOMPSON, REV. JOHN: marriage, 39; Moravian missionaries' account, 39.
- TOBACCO: currency, used as, 55; planting regulated, 94; salaries paid in, 39; staple in trade, 55; trade in, 33; warehouses for, 118.
- TRADE: agriculture chief pursuit, 55; boat building, 55; exports, 33; imports, 34; iron making, 55; objects of, 33; rivers used, 33; tobacco, 33, 55; vessels, 33; wheat exported, 51; wharves, 33.
- TRESPASS: civil action, though a felony, R1; property in declaration, R1; title to land involved in, B207; slave taken away, B331.
- TROVER: bar to, R21; judgment, 22.
- TRUSTS: husband's interest in wife's estate, R110; will by, R45.

- VERDICT: special, R36; ejectment, R55.
- VESPUVIUS, AMERICUS: voyage of, 24.
- VIRGINIA: boundaries, 31; causes of settlement, 28; charters, 28, 30, 31; cities, 33, 113; education, 137; libraries, 140; limits, 31; Maryland taken from, 31; named, 25; North Carolina and, 31; rivers of, 32; settlement, 28, 29; Shenandoah Valley, 34; southwest, 41; trade and commerce, 33; Smith the founder, 27.
- WADDEL, REV. JAMES: blind preacher, 110; character, 110; grave of, 110; hot coffee, and, 110.
- WAREHOUSEMEN: liability of, R70; servants, for, R71; statute as to "Rolling Houses," R70.
- WARRANTY: effect of, R13; sale of slave, in, B45.
- WASHINGTON, GEORGE: education, 138; Fairfax and, 39; Joist Hite and, 40; marriage, 53; opinion of people, 40; South Branch, visit to, 40; surveys by, 39, 40; Williamsburg, at, 131, 132; Winchester, at, 39.
- WAYLES, JOHN; daughter marries Jefferson, 187; lawyer, 187; sketch of, 187.
- WHATELY, REV. SOLOMON: controversy as to incumbency of Bruton Church, 93.
- WHITE, JOHN: disaster to his settlement, 25; grandfather of Virginia Dare, 25; governor of Roanoke, 25.
- WHITFIELD, REV. GEO.: preaches at Williamsburg, 80.
- WILLIAMSBURG: act to establish, 121; Blair and, 89; Bruton Church, 91; capitol, 123; capitol building, 123, 124; churches at, 91, 104, 121; city by brevet, 121; courts held at, 125; early description, 118; fires at, 121; gaiety, 121; houses, 121; Hustings Court, 219; layed off, 123; Middle Plantation, 91; palace, 133; people described, 135; population, 121; Raleigh tavern, 129; removal of capitol attempted, 127; removal, 130; seat of government, 92; streets, 121, 124; trade, 121; Washington at, 131; Whitfield preaches, 88.
- WILLS: after born children, R102, B42, R35; after purchased land, R33; contingent devise, R39; deed compared with, R95; entail created by, R40; estate upon condition, R67; established at law, must be, B60; executors interest under, R44; gift to unborn child, R36; heirs, use of word, R40; issue, effect of use of word, R40, 62, B85; lands devised to be sold, R44; law governing the execution of, B1; legacies affected by statute of limitations, R63; partial intestacy, R44; probate of, B5; residuary clause in, B68; rules of construction, R62, R85, R94, R96; trusts established by, R45.
- WINCHESTER: early description, 118; Fithian's visit, 86; Fredericktown, 38; Moravian missionaries visit, 37; revolutionary beginnings, 87; Washington visits, 38.
- WITNESS: competency affected by interest, B51.
- WRIT OF ENQUIRY: when new writ not awarded, R78.
- WYTH, GEO.: law professor, 153; Marshall studies under, 153.
- YEARDLEY, SIR GEORGE: character of, as governor, 68.
- YEO, GEORGE: books of, 143.

MANUSCRIPT PAGING OF CASES REPORTED BY SIR JOHN RANDOLPH

NOTE.—The paging here given is that of the original manuscript (shown in brackets in the text).

	Page		Page
Abbot <i>v.</i> Abbot	132	Lawson <i>v.</i> Connor	177
Allen <i>v.</i> Stafford	158	Legan & Vanse <i>v.</i> Latany	149
Armistead <i>v.</i> Swiney	204	Lightfoot <i>v.</i> Lightfoot	192
Barrett <i>v.</i> Gibson	179	Marks <i>v.</i> Dunn	154
Barryman, etc., <i>v.</i> Cooper, etc.,	168	Marston <i>v.</i> Parish	145
Blackgrove <i>v.</i> Addison	131	McCarty <i>v.</i> Fitzhugh	219
Booth <i>v.</i> Dudley	122	Meekins <i>v.</i> Burwell	199
Burgess Admx. <i>v.</i> Chichester		Meekins & Vadin <i>v.</i> Burwell <i>et al.</i>	
Admr.	133	<i>al.</i>	126
Churchill <i>v.</i> Blackburn	136	Mutlow <i>v.</i> Ballard	121
Churchill Ads. Machen	140	Nicholas & Ux <i>v.</i> Burwell Exr.	209
Denn <i>v.</i> Smith	161	Powell <i>v.</i> Farrel	166
Digges <i>v.</i> Lilly	119	Ross Exor. <i>v.</i> Cooke <i>et al.</i>	152
Edmonds <i>v.</i> Hughes	146	Smith <i>v.</i> Brown	114
Eppes <i>v.</i> Radford	183	Swiney <i>v.</i> Dandridge	216
Fleming <i>v.</i> Diggs	187	Thornton <i>v.</i> Bucknor	141
Freeman <i>et al.</i> Ads. Hurst Admr.	166	Thurston <i>v.</i> Pratt	173
Goddin <i>v.</i> Morris & Ux. etc.	188	Tucker <i>v.</i> Sweeney	148
Goodright <i>v.</i> Batson	174	Waugh <i>v.</i> Bogg	186
Graves <i>v.</i> Boyd	155	Waughop <i>v.</i> Tate <i>et al.</i>	185
Harrison <i>v.</i> Blair	165	Willard <i>v.</i> Perry	181
Jones <i>v.</i> Langhorn	216	Waddy <i>v.</i> Sturman <i>et al.</i>	170

MANUSCRIPT PAGING OF CASES REPORTED BY EDWARD BARRADALL

NOTE.—The paging here given is that of the original manuscript (shown in brackets in the text).

	Page		Page
Anderson <i>et ux v. Ligan</i>	142	Hawkins <i>v. Bonghan &c.</i>	249
Anderson, <i>quitam, v. Winston</i>	188	Hayward & <i>al v. Chisman & al</i>	64
Anonymous	42, 49, 101	Hill <i>v. Hill's Executors</i>	54
Armistead <i>v. Newton</i>	163	Hill & <i>ux v. Henry & ux</i>	128
		Hunt <i>v. Harratson's Exors.</i>	42
Banks <i>v. Banks & al</i>	283		
Bernard <i>v. Stonehouse</i>	58	Isbel & <i>ux v. Butler & al</i>	40
Bernard <i>v. Washington Parish & al.</i>	254	Ivey <i>v. Fitzgerald</i>	176
Berryman <i>v. Booth</i>	39	Jameson <i>v. Vawter</i>	49
Boys <i>v. Hoggatt</i>	75	Jennings & <i>ux v. Willis</i>	40
Brock <i>v. Lyne</i>	104	Jones <i>v. Langhorn</i>	50
Brooking <i>v. Dudley Dixon</i>	239	Jones &c. <i>v. Porters</i>	88
<i>v. Brooking and Collier</i>			
<i>v. Brooking</i>		{ Cross	87
Buckner <i>v. Chew & al</i>	114	{ Harrison	63
Burges <i>v. Hack</i>	182	The King <i>v.</i> { McClanahan	37
Burwell &c. <i>v. Ogilby &c.</i>	99	{ Moore	35
		{ Oldner & Brilehan	85
		{ Pryor	36
Chew <i>v. Stevens</i>	156	Knight <i>v. Triplet</i>	118
Coleman & <i>ux v. Dickinson</i>	111		
Collier <i>v. Brooking</i>	239	Lightfoot <i>v. Lightfoot</i>	38
Corbin <i>v. Chew's admors.</i>	146, 223	Lutwidge <i>v. French</i>	170
Cross Case	87		
Curle <i>v. Sweney</i>	109	McCarty <i>v. McCarty's Exors.</i>	32
		Major <i>v. Dudley</i>	63
Dancy & <i>al v. Willards admx.</i>	327	Mason's Case	49
Darby <i>v. Stringer</i>	42	Meggs <i>v. Bates</i>	37
Dixon <i>v. Brooking</i>	239	Micon <i>v. Corbin</i>	35
Dudley <i>v. Booth</i>	239	Morris <i>v. Chamberlayne</i>	49
Dudley <i>v. Perrin & al</i>	317	Morris <i>v. Chamberlayne</i>	148
Dunn & <i>al v. Wythe. Et. c. con.</i>	76	Murdock <i>v. Thornton</i>	31
		Myhil <i>v. Myhil</i>	152
Edmondson <i>v. Tabb.</i>	331		
Edwards <i>v. Bridger</i>	109	Nance <i>v. Roy</i>	260
Ewell <i>v. Miller & ux Admix. &c.</i>	249	Nelson <i>v. Seayres</i>	126
		Nicholas & <i>ux v. Burwells Ex'rs.</i>	33
Farron <i>v. Farron</i>	248	Oldum <i>v. Allerton & Pope</i>	307
Field <i>v. Cocke</i>	173		
Fitzhugh <i>v. Burwell</i>	163	Palmer <i>v. Word</i>	268
		Parsons <i>v. Lee</i>	62
Giles & <i>ux & al v. Mallicote</i>	68	Powell & <i>ux v. Thurmer</i>	73
Godwins <i>v. Kinchen's Exors.</i>	64		
Goodloe <i>v. Dudley &c.</i>	81	Reeves <i>v. Waller</i>	32
Graves <i>v. Kennan</i>	41	Richardson <i>v. Mountjoy</i>	194
		Robinson <i>v. Armistead & al</i>	208
Harrison <i>v. Hally</i>	75	Roger's Admix. <i>v. Spalden</i>	76
Harwood <i>v. Grice</i>	43	Rose, Exor. Bagg <i>v. Cooke &</i>	
Hawkins <i>v. Thornton</i>	227, 357	<i>al</i>	179, 213

	Page		Page
Scarburg & <i>ux v.</i> Barbor's Exor.	274	Tazewell & <i>ux v.</i> Harmanson	136
Senior <i>v.</i> Morris	120	Timson <i>v.</i> Robertson	79
Slaughter <i>v.</i> Whitlocke	358, 237	Timson <i>v.</i> Scarbury & <i>ux</i>	130
Smith <i>v.</i> Smith	297	Tucker & c. <i>v.</i> Tuckers Exors.	94
Smither <i>v.</i> Smither	121	Tute <i>v.</i> Freeman	50
Spicer, admx. of Stone <i>v.</i> Pope			
& <i>al</i>	216	Vass <i>v.</i> Phillips	
Stith <i>v.</i> Soane & <i>al</i>	35		
Stretton <i>v.</i> Martin	53	Waddil <i>v.</i> Chamberlayne	43
		Webb <i>v.</i> Elligood	76
Taylor <i>v.</i> Graves	55	Winston & <i>ux v.</i> Henry & <i>ux</i>	199

TABLE OF NAMES IN INTRODUCTION

	Page		Page
Addison, Joseph	140	Cabot, John	24
Ambler, The	246	Carr, Dabney	129, 141
Anne, Queen	95	Carter, Anne Hill	227
Andros, Edmund Gov'r	224	Carter, Ben.	80, 81
		Carter, John	141, 210
Bacon, Nathaniel	29, 68, 78, 122, 246	Carter, Robert, 80, 81, 88, 110, 140, 141, 210, 212	
Barnes, Joseph	33	Carter, Mrs. Robert, 81, 88, 110, 141	
Barradall, Edward, 1, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 41, 92, 93, 98, 99, 124, 142, 177, 178, 179, 180, 184, 187, 192, 193, 210, 211, 212, 226, 229, 236, 243, 244, 246, 247, 248		Carter, Robert ("King"), 210, 211, 218	
Barradall, Mrs. Edward	180, 247	Carter, Robert (Son of "King"), 212	
Barradall, Blumfield	244	Carter, Nancy	80
Barradall, Catherine B.	244	Carter, Prissy	80
Barradall, Elizabeth	244	Cartier, Jacques	24
Barradall, Frances	244	Carys, The	45
Barradall, Henry	186, 244, 246	Chamberlayne, C. G.	46
Bassett, John Spencer	36, 103, 210	Champlain, Samuel de	24, 28
Benger, Elliott	103	Charles, King	45, 67, 68
Berkeley, Sir Wm.	47, 68, 69, 83, 137, 138, 210	Chitwood, Oliver P.	171, 212, 217
Bertrands, The	45	Clark, Sterling	186
Beverly, Peter	228, 235	Clayton, Sir Jasper	185
Beverly, Susanna	228, 235	Clayton, Sir John	185
Beverly, Wm.	191	Clayton, John	182, 185, 211, 247
Blair, James Rev.	89, 98, 99, 100, 101, 103, 104, 148, 149, 150, 151, 152, 153, 210, 213, 218, 222	Conrad, Holmes	197
Blair, John	127, 128, 187, 212	Corbin, Alice	211
Bland, Richard	227	Corbin, Ann	211
Botetourt, Norbourn Berkeley, Gov'r.	70, 71, 109, 142	Crittenden, John J.	153
Bowdoin, The	45	Cromwell, Oliver	67, 69
Bowyer, Sir Wm.	185	Cromwell, Richard	69
Braddock, Edward, Gen'l.	132	Cunningham, Mr.	81
Brayne Ann Butler	102	Curry, J. I. M.	117
Brayne, Richard	102	Custis, John	211
Brayne "Thecky"	103		
Brock, R. A.	6, 67, 102	Dabnys, The	45
Brown, Alexander	50	Dale, Sir Thomas, 78, 113, 157, 158	
Brown, Edward S.	3	Dandridge, John	212
Bruce, P. A.	44, 72	Dandridge, Wm.	212
Brvant Wm. Cullen	26	Dare, Virginia	25
Bryant, J Stewart	167	Davies, Samuel Rev.	110
Bucke, Rev. Mr.	76	Dawson, Prof.	229
Burnet, Gilbert	142	Dean, Charles	26
Burwell, Lewis	100	Delaware, Sir Thomas West,	77, 155, 156, 157
Burwell, Martha	100	De Soto, Juan	24
Byrd, Wm.	15, 36, 66, 103, 113, 144, 210, 211, 212, 218, 222	Diggs, Edward	211
		Diggs, Cole	211
		Dinwiddie, Robert, Gov'r	70
		Drake, Sir Francis	25
		Dryden, John	140
		Drysdale, Hugh, Gov'r,	70, 152, 210
		Dunmore, John Murray, Earle,	70, 129, 188

	Page		Page
Elizabeth, Queen	24, 57	Isham, Henry	227
		Isham, Mary	227, 234
Fairfax, Thomas, Lord,	15, 144		
Fairfax, Sir Wm.	15	Jackson, Stonewall	85
Fauntleroy, Mr.	110	James, King, 28, 44, 57, 67, 68, 160,	214
Fauntleroy, Mrs.	110		
Fauquier, Francis, Gov'r	70	Jeffreys, Herbert	122
Ferrar, Sir Nicholas	66	Jefferson, Peter	227
Fiske, John, 46, 66, 84, 113, 138,		Jefferson, Thomas, 1, 4, 6, 8, 9, 12,	
139, 143, 144, 170, 221, 224		14, 15, 16, 19, 66, 86, 128, 130,	
Fithian, Philip Vickers, 80, 82, 86,		131, 146, 147, 153, 184, 189, 190	
88, 118, 138, 140, 210, 212			227
Fitzhugh, Wm., 141, 142, 160, 179,		Jefferson, Mary	187
186, 245, 246, 248		Jefferson, Martha	187
Fitzhugh, Henry	180	Jennings, Mr.	81
Fitzhugh, Sarah	247	Joetts, The	45
Fitzwilliams, Richard	212	Johnson, Chapman	207
Fontaines, The	45	Jones, Gabriel	132, 139, 188
Fuance, Rev. Mr.	100	Jones, Rev. Hugh, 41, 47, 50, 124,	
Fuller, Rev. Thomas	27	125, 126, 133, 135, 138	
		Jones, Sir Wm.	160, 185
Gates, Sir Thomas	155, 156, 157		
George III, King	71, 109	Keith, Rev. James	227
Gilbert, Sir Humphrey	24, 25	Keith, Mary Isham Randolph,	227
Gooch, Sir Wm.	70, 152, 210		
Goodwin, Rev. W. A. R., 15, 91, 105			
Gosnold, Bartholomew	26	Lane, Mr.	81
Grace, Rev. Isaac	93, 94, 95	Lederer, John	36
Graham, Rev. J. R.	36, 85, 106	Lees, The	45
Green, Wm., 3, 4, 5, 7, 8, 17, 19, 20		Lee, George	81
Green, Rev. Enoch	140	Lee, Henry	227
Grenville, Sir Richard	25	Lee Henry, Gen'l	227, 246
Grigsby, Hugh Blair	189	Lee, Philip Lightfoot	211
Grymes, John	212	Lee, Richard Henry	211
Grymes, Lucy	211, 227	Lee, Robert E., Gen'l, 45, 85, 211,	
Grymes, Mary Randolph	228		227
Grymes, Philip	228	Lee, Mrs. Robert E.	180
Gwyn, David	211	Lee, Thomas	211
		Leigh, Benjamin Watkins	207
Harrison, Benjamin	211	Lewis, John	210
Harrison, Edward	211	Lightfoot Philip	211
Harrison, Nathaniel	211, 218	Locke, John	140, 141
Henry VIII, King	57	Lodge, Henry Cabot, 26, 106, 107,	
Henry, John	142	113, 139, 179	
Henry, Patrick	128, 129, 187	Loudoun John Campbell Earle, 70	
Henry, Wm. Wirt	26, 27	Ludwell, Philip, 93, 95, 97, 165,	
Hite, Jost	38, 39, 40, 41	210, 211, 218	
Holloway, John, 104, 180, 181, 182,		Lundsforde, The	45
183, 184, 211, 223			
Hoole, Wm.	33		
Hopkins, Wm., 1, 8, 12, 17, 19, 20		Madison, James	45
180, 182, 183, 184, 242		Marshall, John, 45, 111, 130, 147,	
Houghton, John	188	153, 207, 227	
Howard, Henry Sydney	26	Marshall, Mary Isham Randolph,	
Howe, Henry	48		227
Hudson, Henry	24	Marshall Thomas	227
Hunt, Rev. Robert	76, 77	Maryes, The	45
Hunter, Wm.	146	Mary, Queen	57

xxvii

	Page		Page
Mason, George	9, 45	Randolph, John, 8, 9, 184, 188, 190,	228
Maury, The	45		
McGuire, F. H.	209	Randolph, Sir John, 1, 2, 4, 5, 7, 8,	
Meade, Rt. Rev. Wm., 99, 107, 112,		9, 13, 14, 15, 16, 17, 18, 19, 20,	
243, 244, 245, 246		41, 92, 93, 98, 99, 124, 139, 177,	
Miller, Elmer J.	34, 74	178, 179, 180, 181, 182, 184, 187,	
Minor, John B.	171	190, 192, 193, 210, 211, 212, 223,	
Moncures, The	45	226, 228, 229, 230 233, 234, 235,	
Monroe, James	45, 153	236, 237, 243, 248	
Montezuma	24	Randolph, Mary	227
Morris, Edward	148	Randolph, Peyton, 9, 66, 139, 188,	
Muhlenberg, John Peter Gabriel,		190, 228	
Gen'l	109	Randolph, Thomas	186, 227
Myers, H. H. B.	10	Randolph, Sir Thomas	220
		Randolph, Wm.	212, 227, 234
		Reeve, Thomas	186
Needler, Benjamin	186, 187	Rind, Wm.	146
Neile, Edward D.	26	Robinson, Conway, 2, 5, 6, 12, 14,	
Nelson, Thomas	129	19, 24, 66, 216	
Newport, Christopher, 26, 28, 30, 44		Robinson, Wm.	212
Nicholas, Philip Cary	3, 6	Rochfoucauld	118
Nicholson, Francis, Gov'r, 70, 93,		Royle, Joseph	146
99, 103, 122, 149, 151, 199, 210			
Northey, Sir Edward	94, 185	Sandys, Sir Edwin	60
Nott, Edward, Gov'r	70, 133	Scott, W. W.	2, 4, 103
		Scott, Winfield, Gen'l	153
Orkney, Earle of	101	Seldon, John	143
		Shakespeare, Wm.	141
Page, John	95, 180, 190, 211	Skelton, Bathurst	187
Page, Judith Carter	211	Smith, Arthur	143
Page, Mann	211	Smith, John (Councilor)	210
Page, Mathew	190, 211	Smith, John, Capt., 26, 27, 28, 30,	
Page, Thomas Nelson	202	31, 32, 33, 43, 44, 72, 77	
Palmer, John	186	Southampton, Earle of	66
Parke, Daniel	211	Spotswood, Alexander, Gov'r, 35,	
Parks, Wm.	145, 146	36, 37, 39, 70, 101, 103, 104, 134,	
Pendleton, Edmund	9, 129, 187	153, 182, 210, 221, 222, 223	
Pinkney, John	147	Spotswood, Mrs. Alexander, 35, 36,	
Pizarro, José Alfonso	20	37, 39, 70, 101	
Pocahontas	26, 27	Stanard, W. G.	244
Pole, Godfrey	189	Staples, W. R.	72, 201, 204
Ponce de Leon, Joan	24	Sterne, Lawrence	141
Porteus, Robert	211	Stith, Rev. Wm.	66, 229
Powhatan, King	33		
		Tayloe, John	211
Raleigh, Sir Walter,	24, 25, 131	Thomas, R. S.	30, 78, 107, 108
Randolphs, The	9, 45, 226	Thompson, Rev. John	39, 102, 103
Randolph, Beverly	228	Thompson, S.	180
Randolph, Edward	227	Turberville, George	81
Randolph, Edmund	153	Tyler, Lyon Gardner, 29, 34, 130,	
Randolph, Elizabeth	227	135, 149, 153	
Randolph, George	5		
Randolph, Henry	227	Vespucius, Americus	24
Randolph, Isham	227		
Randolph, Jane	227	Waddel, Rev. James	110
Randolph, John (of Roanoke), 207,		Waddell, J. A.	38
226			

	Page		Page
Washington, Geo., Gen'l, 40, 41,		Wickham, Rev. Mr.	76
131, 138, 246		William, King	123
Washington, Mrs. Geo., 132, 211,		Wise, Henry A.	29
212		Wren, Sir Christopher	150
Wayland, J. A.	36	Wythe, Geo., Chancellor, 5, 9, 111,	
Wayles, John	187	130, 153, 180, 187	
Wheatley, Rev. Solomon, 93, 94,			
95, 96, 97, 152		Yeardeley, Sir George	60, 63, 158
White, John	25	Yeo, George	143
Whitacker, Rev. Alexander	76, 78	Young, Edward	140
Whitfield, Rev. George	88		

INTRODUCTION

CHAPTER I

THE BOOK

The cases printed in this book were reported by Sir John Randolph and Edward Barradall, and were all decided by the General Court of the Colony of Virginia between 1728 and 1743; this Court, after the General Assembly ceased to exercise judicial functions, being the highest court in the Colony.

Although all the cases reported were decided between 1728 and 1743, there are prefixed to those reported by Barradall, some opinions of the Attorney Generals of the Colony and of other persons, which are of a much earlier date, and one opinion of Barradall himself, dated as late as March 29, 1741. With these opinions, which preface the decisions reported by Barradall, is also an opinion by Sir John Randolph.

The cases reported by Edward Barradall are of dates between April, 1733, and October, 1741. Those reported by Sir John Randolph are between the dates of October, 1728, and October, 1732.

Formerly, there was also a manuscript report of cases by William Hopkins, between the dates of October, 1731, and April, 1733, but, as will be seen later, all of this original manuscript except a fragment,¹ four pages of one case, has disappeared, although one case — that of *Custis vs. Fitzhugh*, of less than four printed lines — has been preserved in the reports of Jefferson.

¹This fragment is *said* but is not known to be in Mr. Hopkins' handwriting. In the Barradall-Randolph manuscripts, owned by the Library of Congress, there are also "abridgments," a few lines each of seventeen cases, said to have been taken from a notebook of William Hopkins. They were not regarded as of sufficient interest to be included in this publication.

In the tenth chapter of this introduction some further reference will be made to these reported cases and brief sketches — although I believe all that is known of them — given of the reporters themselves. Of these it is only necessary to say here, as fixing the period of colonial life with which they are associated, that Sir John Randolph was born in 1693 and died March 9, 1737, in his forty-fourth year; and that Edward Barradall was born in 1704 and died on the 19th day of June, 1743,¹ aged thirty-nine years.

Barradall's work as a reporter was done between his twenty-ninth and thirty-ninth years, and that of Randolph between the thirty-fifth and forty-fourth years of his age.

All of the cases of Barradall here printed are taken from a manuscript once owned by Mr. Conway Robinson, and now the property of and preserved in the State Law Library at Richmond, Virginia. All of the cases here printed, as reported by Randolph, are copied from a manuscript in the possession and ownership of the Virginia Historical Society. The copies for the printer were under the direction and supervision of Mr. W. W. Scott, Librarian of the Virginia State Law Library, and their accuracy and completeness, except in a few instances of illegible obscurity, and the obliteration of the ink marks by the time-worn condition of the paper, are certified to by him.²

The manuscript from which the Barradall cases were copied is in several handwritings, but none of it is in that of Barradall. This copy was presented to the State Law Library by Mr. Conway Robinson, the eminent lawyer and author. At the time of its

¹The date was translated from the epitaph on his tombstone according to the present method of reckoning time.

²Some entirely illegible portions, as appear by notes to the cases in this book, were supplied from the reports of the same cases in the manuscript of the Library of Congress.

presentation, however, it did not contain all the cases which are now in the copy. While Mr. Philip Cary Nicholas was the Librarian, copies were made by him of such cases of Barradall's as were lacking, from the manuscript copy owned by Mr. William Green.

We are told¹ that when Mr. Nicholas made these copies, the pages inserted by him were slightly stained so as to make them conform to the age-colored tints of the other pages. There was no concealment or deceit intended by this, but merely the attainment of uniformity in the appearance of the pages, and the whole manuscript, which up to that time seems to have been in loose sheets, was securely bound in sheep, the pages being of folio size.

This manuscript copy is thus quite well preserved, but the copyist from the original did not always write out the cases on continuous pages, and some mistakes were made, for which, evidently, Barradall was not to blame. These pages, thus out of place, have been inserted in proper and continuous order in the book, but no other changes have been made, and the original manuscript paging has been preserved.² But the pages, which would have been properly numbered 233, 234, 235, and 236, if the reported cases had been originally properly copied in their sequence and order, do not now exist, and manuscript pages 357, 358, 359, and 360, which do give reports of the cases according to their correct context, have been inserted in their places.

These errors were not the fault of one copyist alone, for from the differences of handwriting it is evident that there were several scribes who toiled over this dull work. The copy, however, furnished to the printer is beautiful and legible

¹By the reliable and efficient colored assistant to the librarian, Edward S. Brown, who for so many years has been connected with the State Law Library.

²Shown in brackets in this publication.

enough to have suggested the desire for its being lithographed instead of merely put in type, had such a plan been at all practicable.

Throughout this Robinson copy of the manuscript Mr. William Green has, in his characteristic handwriting, made many marginal notes, and these have been preserved and printed with the text, being, however, plainly indicated so as not to be confused with the work of Barradall. The same is true of the few explanatory notes made by Mr. Scott. And all that is said here in this respect about the Barradall cases, is true, also, of the notes to the cases reported by Sir John Randolph.

The cases reported by Randolph, and printed here, are copied from a manuscript owned by the Virginia Historical Society, and *supposed* to be the original manuscript of either Barradall or Randolph, but of which one, or if even of either, it is hard to speak with certainty, as will presently be explained.

Twenty-six of these cases as reported by Barradall and four of those reported by Randolph were copied by Mr. Jefferson from the originals, and, as first printed, are contained in a little pasteboard bound book, the cases having no synopses or notes. Synopses and notes have been added in later editions, and while useful and desirable, are not the work of Randolph, of Barradall or of Jefferson.

Both the editor and the publisher of this printed edition of these reports think they would be objects of greater interest and serve an equally useful purpose if printed just as they are in manuscript; but to lessen the labors of the student or reader an index and table of names are given which furnish the name and a brief statement of the subject of each of the cases.

It was, of course, most desirable to know the history of this Robinson copy of the original manuscript, from which copy this edition is printed, as this might have led to the identity of the original, but, beyond the certainty that it was owned and presented to the State Law Library by Mr. Robinson, nothing is known of its origin.

Mr. Green's notes and references to this manuscript in his own copy, and the contemporaneous recognition and use of it by such men as Conway Robinson and William Green are, to all who knew them, certificates enough of their authenticity; and the genuineness of the cases here contained is further verified by comparison with the same cases contained in the other manuscripts presently to be described.

A letter addressed by Mr. Robinson to this writer, and written for insertion in the preface of a work¹ of which he is the author, in giving a list of the then existing Virginia Reports gives "Barradall Reports" as the earliest.²

In his preface to "Robinson's Practice," published in 1832, the author says: "All the judicial decisions of the State which have been published, *or which exist in manuscript to which I could have access*, have been carefully perused, and notes taken of such matters as illustrate the practice of our courts.

The publisher³ of the edition of 1852 of Wythe's Reports, in the forepart, speaks of "Barradall's Reports, now in manuscript, but which the publisher hopes ere long to lay in type before the public."⁴ This was never done, however, and this writer does not recall any other reference to the Barradall or Randolph

¹Barton's Law Practice, 1st edition.

²He does not mention Randolph's manuscript.

³George Randolph, Richmond, Virginia.

⁴Neither does he refer to the Randolph manuscript.

manuscript cases in any Virginia or other law book, except where some of the same cases are reported by Mr. Jefferson and are referred to as "Jeff R." Besides the Robinson copy of Barradall cases there is in existence another copy with no more claim than the Robinson manuscript to being an original. That copy was owned by Mr. William Green, and, while its former history is as obscure as that of the Robinson copy, its authenticity is equally as well established.

It was by a comparison with and copying from Mr. Green's copy that Mr. Nicholas, the librarian, completed the Robinson copy and made the two substantially identical.

After the death of Mr. William Green, a catalogue of his valuable library was prepared by Dr. R. A. Brock, who was not only well acquainted with most books of every sort, but was especially familiar with those owned by Mr. Green. This catalogue was issued as an advertisement of the sale of this library, and in it this is said of the Barradall manuscript:¹

"No. 2322-³/₄.

Manuscript Reports of the General Court of Virginia from April, 1733, to October, 1741, taken by Edward Barradall, Esquire, late Attorney-General there. Annotated by Judge William Green. Folio. Newly bound in calf."

Then comes this note by Dr. Brock: "It may be of interest to remark that another manuscript copy of Barradall's Reports, differing somewhat as to the cases reported in them, and supplementing it, is in the possession of Conway Robinson, Esquire, Washington, D. C. There is also among the collections of the

¹Green Catalogue, page 199.

Virginia Historical Society, a manuscript copy of the cases decided in the General Court of Virginia from the period October, 1728, to October, 1741, reported by and in the autograph of Sir John Randolph, Attorney-General for the Colony, which is not only additional as to the cases, but also in their details."

At the sale of Mr. Green's library his manuscript was bought by some person, whose name was not taken, for the sum of twenty-five dollars. For some months after this scheme of publishing these reports had been determined upon, diligent search was made for the owners of this manuscript, and it was at last found in the possession of Harvard College Law Library. It was a gift from the purchaser, Brinton Coxé of Philadelphia.

The manuscript is described as a very handsomely written folio, bound and inscribed "Barradall's Reports." It begins page 1 with this announcement:

"Cases Adjudged in the General Court of Virginia from April, 1733, to October, 1741, taken by Edward Barradall, Esquire."

There are two hundred and sixty-three folio pages, containing three hundred and thirty-three *starred* pages, which prove the copy to be from some original or other copy; with many notes and comments by Mr. William Green, in his own handwriting. There is also a final note by Mr. Green, of two pages, which reads as follows:

"Finis (of Barradall's Reports) in C. R.'s¹ copy as well as in this *later*² one.

"In that (C. R.'s) copy, which is at present ————
—— me,³ there follow pp. 334-352 filled with other matter, certainly no way connected with Barradall.

¹Conway Robinson, the copy here printed from.

²William Green's, now owned by Harvard University.

³Word or words left blank.

And on pp. 1-30¹ thereof are copies of opinions of eminent counsel in England and in Virginia, whereof only one was given by Barradall himself. This so connects with the last article here preceding, that I shall take the trouble to subjoin a copy thereof."

Here follows the copy as made by Mr. Green, but as it is printed in its place in this book² it will not be inserted again here. The note of Mr. Green concludes as follows: "The last preceding article is also copied (by me) in another volume, where I have likewise copied *all* the other articles described (by me) *ante* 262. So that I now possess copies of all matters in Mr. Robinson's volume and am ready to turn it over to the State."

The complete copies of Barradall's reports are therefore in the Robinson and Green manuscripts, and only there, because the only other two known manuscript copies of these reports, as will presently be seen, are far from being complete in this respect. What is, or was, the original from which all these copies were made becomes an interesting question.

In a preface to his reports, Thomas Jefferson³ says: "When I was at the bar of the General Court, there were in the possession of John Randolph, Attorney-General, three volumes of manuscript reports of cases determined in that Court; the one taken by his father, Sir John Randolph, a second by Mr. Barradall, and a third by Hopkins. These were the most eminent of the counsel at that bar, and give us the measure of its talent at that day. All, I believe, had studied law at the 'Temple' in England, and had taken the degree of Barrister there. The volumes comprehended decisions of the General Court from 1730 to 1740, as

¹As printed here.

²Manuscript page 29.

³Jefferson's Virginia Reports.

well on cases of English law as on those peculiar to our own country. The former were of little value, because the Judges of that Court, consisting of the King's Privy Counsellors only, chosen from among the gentlemen of the country for their wealth and standing without any regard to legal knowledge, their decisions could never be quoted, either as adding to or detracting from the weight of those of the English courts on the same points. Whereas, on our peculiar laws, their judgments, whether founded on correct principles of law or not, were of conclusive authority. As precedents, they established authoritatively the construction of our own enactments, and gave them the shape and meaning under which our property has been ever since transmitted and is regulated and held to this day. These decisions, therefore, were worthy of preservation. With this impression, I undertook to extract from these volumes every case of domestic character. They constitute the earlier part of this volume.¹

"During the subsequent period, which may be called that of Wythe, Pendleton, the Randolphs, Peyton and John (sons of Sir John) Mason, etc., until 1768, an interval of twenty-eight years, no reports, I think, were ever taken. *At the later date*, I began to commit to writing some leading cases of the day, confining myself still to those arising under our peculiar laws, and I continued to do so until the year 1772, when the Revolution dissolved our courts of justice and called those attached to them to far other occupations. Those cases I have added to the former series."

The "extracting" of the cases from the Randolph and Barradall manuscripts probably did not long

¹Mr. Jefferson copied four cases from the Randolph manuscript, one from Hopkins, and twenty-six from Barradall.

precede the reporting some of the leading cases on Colonial law, which Mr. Jefferson says he took up in 1768. At that time Barradall had been dead about twenty-five years, and Sir John Randolph thirty-one. Hopkins had been dead thirty-four years. The three volumes of manuscripts of Barradall, Randolph, and Hopkins were at that time in the possession, which is supposed to mean the ownership, of John Randolph, the son of Sir John Randolph. He had naturally come into possession of the Randolph manuscript by inheritance, and of the other two probably by purchase, after the deaths of those authors. But as there is nowhere any suggestion of collaboration between these authors, it must be that Mr. Jefferson in calling the manuscripts "three volumes" meant three separate books of manuscript.

Assuming that the copies from which Mr. Jefferson made his extracts were the originals, which is almost necessarily to be inferred, those now claimed to be such must answer to Mr. Jefferson's description, in order to establish their identity. The two manuscripts offered for this competition are the volumes in the possession of the Library of Congress and of the Virginia Historical Society. A manuscript spoken of by Mr. William Green as the "Myers' copy" may be either of these, but is probably not a fifth manuscript. Nothing is *known* of the origin of either of these manuscripts.

Mr. Green, in a note in the Virginia Historical Society copy, to the case of *Smith vs. Brown*, the first of the Randolph cases, and on page 114 of that copy, says: "S. C. (same case) in manuscript Virg. Rep. in Congr. Library supposed to have come from Mr. Jefferson's Library."

Mr. H. H. B. Myers, the chief bibliographer of the

Library of Congress, makes this note about this manuscript in answer to an inquiry for information from the Library as to matter relating to Barradall. "While this book was in the possession of Thomas Jefferson, a selected few of the cases, from 1730 to 1740, were published by him, with some cases of his own reporting."

But Mr. Jefferson's own note shows that at that time the original three volumes were in the possession of John Randolph, and only for the time in his; nor did Mr. Myers mean to say that there was any *proof* extant that the manuscript now in the Congressional Library was the same that Mr. Jefferson copied from.

At my examination of this manuscript I found it in the part of the Library devoted to early Virginia law books, Acts of the Colonial General Assembly, etc., and among them were some books that came from Mr. Jefferson's library, for the latter bore in one way or another the evidence of his ownership. There is, however, nothing whatever in this manuscript to indicate that it was ever owned by Mr. Jefferson. The company it happened to be in, as I found it, was of but little significance, as it had then already been adjudged to be out of place, and an order was about to be made transferring it to the manuscript department of the Library. But this manuscript bears on its face evidence of *not* having been that from which Mr. Jefferson made his copy. It is one continuous book in one handwriting, of the Barradall and Randolph and some Hopkins cases, paged continuously from beginning to end, and with an index of all the cases (Barradall, Randolph and Hopkins) alphabetically arranged, and otherwise without discrimination. The index, also, is in the same handwriting as the text, and, so far as I could judge, the figures of the

paging and of the index were written by the same hand.

The only apparent remains of an original Hopkins manuscript consist of four pages, fastened between the fly leaves and the back of the binding of the Congressional Library copy, in a wholly different hand from the rest of the text — a fragment of some case without heading or beginning or end, and, indeed, with nothing better than conjecture to determine what it is.

The Barradall cases in this manuscript commence on page 1 with the case of Corbin *vs.* Chew's Admr., which is also reported on page 146¹ of the Robinson² manuscript, and continue through to page 159, where, at the end of the case of Knight *vs.* Triplett, are these words: "Here follows an abridgment of cases reported by Mr. Hopkins, extracted from his notebooks."³

Then follow twenty-three cases, most of them consisting of the name of the case and a few lines stating the subject, of which the case of Custis *vs.* Fitzhugh is one, and it is a fair sample of the others.⁴

Of these twenty-three cases six are also reported by Barradall, and as such are printed in this book from the copy of Mr. Conway Robinson presented by him to and now in the Virginia State Law Library. The last of the twenty-three cases is that of Anderson *vs.* Ligan,⁵ which ends on page 200 of the Congressional Library manuscript.

On page 200 of the Barradall part of this manuscript, without regard to the previous announcement on page 159 as to the abridgment from Mr. Hopkins' note-

¹The same case also reported in different language on page 223

²Printed in this book.

³Which seems to indicate that the notebook was the original, so far as Mr Hopkins' reporting is concerned.

⁴See Jefferson's Virginia Reports, page 72.

⁵A Barradall case also, and on manuscript page 142 of this book.

books, which follows that page, is the further announcement in large, ornamental black-letter writing: "Here end the arguments of Edward Barradall, Esq."

Over the leaf on page 201, in similar writing, are the words: "And next comes the Reports of Sir John Randolph of cases adjudged in the General Court." These, in the original, were evidently intended for one continuous statement, being plainly so written in the Virginia Historical Society copy.

It must be borne in mind that all the cases of Barradall printed in this book are taken from the Robinson manuscript, and all the cases of Sir John Randolph are taken from the Virginia Historical Society manuscript. But continuing to confine our attention, for the present, to the manuscript of the Library of Congress, we observe that the first Randolph case there reported has the title of *Smith vs. Brown*, was decided at the October Term, 1729, of the General Court, and is on page 201 of the manuscript. This same case is also the first reported in the Virginia Historical Society manuscript, and is on page 114 of that copy, the Barradall reports ending over the leaf, on page 113.

The last case reported in the Library of Congress manuscript is *Waddy vs. Sturman*, and is on pages 239-241, and is the sixteenth and last of the Randolph cases in that copy.

Eight of these sixteen cases occur in the same order also in the Virginia Historical copy, but while the ninth case in order in the Library of Congress copy is the case of *Marston vs. Parish*, the ninth in the first named copy is *Churchill vs. Blackburn*, and *Marston vs. Parish* is the twelfth case in order in the Virginia Historical Society copy.

The remaining seven Randolph cases, in the Library

of Congress copy, are *Edmunds vs. Hughes*, *Tucker vs. Sweney*, *Powell vs. Thurmor*, *Thurston vs. Prat*, *Waughop vs. Tate*, *Waughn vs. Bagg*, and *Waddy vs. Sturman*.¹ All of these cases are also in the copy of the Virginia Historical Society; not in this order, but with cases intervening that are not in the Congressional Library copy.

As there are forty Randolph cases reported in the Virginia Historical Society manuscript and only sixteen in the Library of Congress copy, it remains that there are twenty-four Randolph cases in the former manuscript which are not in the latter.

But now applying the test for originality adopted in this examination, we find that Mr. Jefferson extracted from the manuscript of Sir John Randolph's Reports, owned by his son John Randolph, four cases, *i.e.*, *Marston vs. Parish*, *Edmunds vs. Hughes*, *Tucker vs. Sweney*, and *Waddy vs. Sturman*. All of these are in both the Virginia Historical Society and the Library of Congress copies. Nothing, therefore, is proved by this fact. But there are twenty-six Barradall cases also extracted by Mr. Jefferson from the original Barradall manuscript.

An examination of the Virginia Historical Society copy of the Barradall manuscript shows that two of these cases, *i.e.*, *Anderson vs. Winston* (24 Jeff.) and *Spicer vs. Pope* (43 Jeff.)² are neither in the text nor in the index of that manuscript.

The case of *Anderson vs. Winston* is in the Library of Congress copy, but *Spicer vs. Pope* is not, nor are the cases of *The King vs. McClanahan*, *Darby vs.*

¹These titles were very difficult to decipher, and different readers may well be excused for giving them different interpretations. The index, however, was a great help in spelling them out.

²Both cases are in the Green-Harvard manuscript of Barradall cases, on page 163, and in the Robinson copy, on page 216.

Stringer, Tute *vs.* Freeman, or Webb *vs.* Elligood, of those abstracted by Mr. Jefferson, in that manuscript.¹

If, therefore, the case of Anderson *vs.* Winston is not in the Virginia Historical Society manuscript and the other cases named are not in the Library of Congress manuscript or the Virginia Historical Society manuscript they could not have been extracted by Mr. Jefferson from either of these manuscripts, and therefore, determined by this test, neither of them is an original, written by the hands of Barradall or Randolph, respectively.

Naturally, it will be inquired why the test of handwriting also was not applied. This was, in fact, done, although it proved difficult to find a specimen of Barradall's handwriting. Happily a friend² knew of the existence of a letter of his, and informed the writer of it. It was found in the possession of the Virginia State Library, and the use of it for comparison kindly permitted.³

Laid beside the manuscript in the possession of the Virginia Historical Society, the similarity of the two handwritings was so great as at first to convince the three examiners present that the whole manuscript was in the handwriting of Edward Barradall. The writer's first inference was that the part that contained the reports of Barradall was autograph, and as he had survived Sir John Randolph six years and had appreciated the value of his reports, it was

¹All are in both the Green-Harvard and the Robinson copies

²Rev. W. A. R. Goodwin, A.M., of Williamsburg, Virginia.

³It is addressed to Lord Fairfax, and, as it shows, concerns his property in the Northern Neck. Lord Fairfax answered this letter in person from "Westmoreland," signing it "F". There is a further reply of the same date, with this ending: "I am, with unalterable esteem, W. F." This was probably Sir William Fairfax, who attended largely to the landed interests of Lord Fairfax. The writings of Col. Wm. Byrd, page 401, speak of Barradall as the agent of Lord Fairfax.

inferred that he had, after Randolph's death, or possibly in his life-time, made a copy of them for his own use. But when the further test of comparison with the handwriting of Sir John Randolph was made, there came the strange discovery that their letters, although evidently genuine, were so much alike, and, therefore, the two manuscripts also, being apparently in the same handwriting, it was impossible to say whether Barradall or Randolph wrote them. Indeed, in spite of the similarity of handwriting, it is also impossible to say that either of them wrote them.

When the photographic copy of Barradall's letter was compared with the handwriting of the manuscript in the Library of Congress, the same striking similarity was observed, but a close examination discovered a few radical differences in the way of making some of the letters that is consistently practised throughout the letter and the manuscript, respectively. There was nothing, therefore, to be concluded from this test, which, indeed, is seldom absolutely reliable.

But if it be true that when Mr. Jefferson made his extracts these manuscripts were in three volumes, written at intervals of some years apart, by different men not in anywise acting together, it cannot be believed that a manuscript copy of both Barradall's and Randolph's reports, all in the same handwriting, paged throughout as if it was one volume, indexed alphabetically and without discrimination, and announcing the ending of Barradall's Reports on one side of a page and commencing the Randolph reports on the other side of the same page, with only the intervening announcement¹ at the top of the page, under the date of "October, 1729," when none of the Barradall

¹In the Congressional Library manuscript two sentences are made of this announcement.

cases were reported or even decided prior to 1733, in a continuous sentence,—“Here ends the arguments of Edward Barradall, Esq., and next comes the Reports of Sir John Randolph of Cases Adjudged in the General Court,”—could have been the originals; nor does the announcement on page 119 that the succeeding cases are abridgments from Mr. Hopkins’ notebooks, help the claim to being originals.

But if neither of these manuscripts be originals, yet they—especially the Virginia Historical Society manuscript—are very old, and there are points of interest about them that warrant a closer description, and, coming from the sources that they do, it may be felt with confidence that all of the cases contained in both of them are genuine copies from the original reports.

The Virginia Historical Society manuscript at one time contained as many as 251 pages of text, that being the number of the last page, and this is immediately followed by the index, which covers two pages and a small part of a third. It is evident that the pages which are missing were lost or destroyed before the manuscript was bound.¹ This is shown both by the way in which the leaves are inserted in the binding, and by the fact that some of the marginal notes of Mr. William Green are caught in the back of the book, and therefore could not have been written *after* the binding.

The number of the first existing page has faded beyond recognition, but on that page near the top begins the case of Giles vs. Mallacote, and this, the

¹There are only thirty-seven out of one hundred and fourteen pages originally in the text remaining of the Barradall (including Mr. Hopkins’ abridgments) Reports in the first part of the manuscript, but there are one hundred and seven pages of the Randolph cases, and then twenty-seven more pages of the Barradall cases.

index shows, belongs to page 33. This is the first of the Barradall cases, the text of which is still preserved in this manuscript. Then follow four pages to page 36, after which the pages are missing on to page 41. From page 41 they continue up to and including page 56, after which there is a gap to 97. From this page to page 113 the pages are preserved, but at this point the Barradall cases end with *Anderson vs. Ligan*, which is on page 142 of the Robinson copy, and on page 83 of the Congressional Library copy; being, as in the Virginia Historical Society copy, the last of the Barradall cases there reported.

The Hopkins' abridgments commencing, as in the Congressional Library copy, with the case of *Chew vs. McFarland*, appear by the index to have begun on page 81, and been continued between that page and page 97, where appears the case of *Tinson vs. Scarbrough*, which was also a Barradall case.

On page 114, as already stated, is the announcement in one continuous sentence,—“Here ends the arguments of Edward Barradall, Esq., and now comes the Reports of Sir John Randolph of Cases Adjudged in the General Court,”—written in black-letter, with quite a successful attempt at ornamentation.

From page 114 to page 221 there is no missing leaf, the last case reported being *McCarty vs. Fitzhugh*, which, of course, is not one of the sixteen Randolph cases reported in the manuscript of the Library of Congress.

On page 221, in the handwriting of Mr. William Green, occurs this sentence “ [End, as I conjecture, of Sir John Randolph's Reports, which begin page 114 *ante.*] ”

Page 222 is blank, but on page 223 begins again a report of Barradall cases, commencing with *Myhill vs.*

Myhill, which is on page 152 of the Robinson copy, and on page 12 of the Congressional Library copy.

The further reports of Barradall cases are six in number, to page 251, the last case being "Rose Exor Bagg *vs.* Cooke," which is reported both on pages 179 and 213 of the Robinson copy, and is on page 44 of the Congressional Library manuscript.

On page 252 commences the index, which occupies also page 253 and a small part of page 254. This index, arranged alphabetically, contains the titles of one hundred and twenty-three cases of Barradall, Hopkins, and Randolph, without discrimination, of which forty-two are Randolph and eighty-one are Barradall and Hopkins cases.

But because of the loss of sheets in the Barradall and Hopkins parts of the manuscript there are only seventeen of these cases in the text, and of several of these only a part remains.

Mr. William Green has industriously noted on the margin of this manuscript which of the Barradall cases, still preserved, are also in his manuscript, now owned by Harvard College, which are in the Reports of Mr. Jefferson, and all of the Barradall cases are noted as being in his copy.

On the margin of the Randolph cases he notes which of them are also in the manuscript of the Congressional Library, and of the forty-two cases only sixteen have this note, which is, as before stated, the whole number of Randolph cases there reported.

Mr. Green in noting which of these cases were reported by Mr. Jefferson, as to six of them, reports that they were also reported by Barradall, and are in the Harvard copy.

This copy of the Virginia Historical Society manuscript has all the appearance of a very ancient docu-

ment. A good deal of the writing has disappeared, not apparently by the fading of the ink, but by the gradual wasting away of the paper. In many places the pages are perforated with holes from the same wasting process.

The chirography is fine, and much labor must have been spent upon the construction of the titles at the heads of the cases, and only in a single case is the title given in the plain writing in which the body of the case is recorded.

The manuscript in the Congressional Library is strikingly like that of the Virginia Historical Society; apparently the same handwriting, with the same black-letter titles, the same continuation of Barradall, Hopkins, and Randolph cases, with the announcement of the ending of the Barradall and the beginning of the Randolph cases, and the same kind of index at the end of each.

But the color of the ink in this copy is, and looks as if it was originally, lighter than that in the other copy. It is written more loosely, with greater spaces between the lines, wider margins, and, consequently, more pages for the same number of words. The abbreviations are not the same in each copy, although the same kinds of abbreviations appear about equally in both. The order of the report of cases is different, and not all the same cases are in each copy. The Congressional Library manuscript has no marginal notes by Mr. Green, and only two by any other hand. But, as we have seen, the arrangement of the cases differs, and there are in the Congressional Library manuscript only sixteen of the Randolph cases.

So nearly wasted away are some of the pages of the Virginia Historical Society manuscript that occasionally the writing had become too obscure to be legible,

and about a page and a half of the text was so perforated with small holes that the ink marks had become obliterated on one side of the page, although plainly decipherable on the other.

Because of the total loss of many pages of this manuscript but a few of the Barradall cases (of which there were originally sixty-four as shown by their names in the index, the total number of titles indexed being one hundred and twenty-three, of which forty-two were Randolph cases) are still preserved in this manuscript.

The paging of the Congressional Library copy is continuous from 1 to 241, the first 200 pages being devoted to Barradall and Hopkins cases, and forty-one pages to Randolph's Reports.

The fragment of four pages, of what may possibly be a part of a case as originally reported by Hopkins, completes this copy of the manuscript.

This ends the description of this manuscript, and such of the history as could be discovered of these rather unique and interesting documents. More, however, will be said of the cases themselves, and of the Reporters who took the trouble to preserve them, hardly thinking when they wrote them down in the interesting little capital of the Colony, so many years ago, that they would come to light in printed form near the end of the first decade of the twentieth century.

The writer agreed with the publisher, whose zeal as a book maker, and patriotic public spirit, are responsible for this production, that the Reporters and their work would be much better appreciated if they were set to the reader in the midst of their own environment; if some short narrative (in somewhat lighter vein than these rather heavy and dry expositions) of the times and conditions under which they

wrote,—of the country, the people, the social life, the laws that governed them, and what led to their making; the occupations of the people, their property, and the conditions which helped its acquirement and fixed the character of its tenure and transmission; their religion and politics, their courts, and the lawyers; their legislatures and the character of their legislation; all this having for its motive an exposition of the reason for the things that happened, and that found their way into the cases decided by those courts of so long ago, and set down by able and industrious writers among a people then more than a century old, but who, to us, as we look back so far, seem as if they must have appeared to be very new and primitive, which in point of fact they did not, to the rest of the world which happened to know about them,—should precede the reported cases themselves, and serve as an introduction to them. Some of this I have attempted to do in the nine chapters which succeed this opening one, with no effort at writing a new history, or of discovering much that was not known already, nor with the wish, with subtle or profound analysis, to uncover things not exposed before, but only aspiring to a simple narrative, in which it is hoped that the reader will find something to interest him, to serve as a little sauce for the heavier dish that comes after, and of which some may desire to taste.

CHAPTER II

THE LAND

The effort to make a permanent lodgment upon the central part of the Atlantic Coast had been like that of a drowning man in rough waters trying to climb a bank. Some dire mishap, like the crumbling soil to the swimmer, seemed to befall each venture, as if, indeed, their fearful imaginings of witches hovering in the air over their heads, or of some land god or devil from the dark recesses of the wooded shore, pushed off the palefaces lest they should take hold of the land. But it was not to be wondered that, after their weary voyages across the sea, the tall red cedars that gently bent in the breeze, the wild grape vines borne down with the weight of their inviting clusters, and the deer and turkeys and other game, much of it new to them and in wonderful abundance,¹ seemed to continue to beckon them on, and to be the beginning of the realization of their dreams of a land where gold was more plentiful than copper, and of cities where the street chains, the fetters of the prisoners, and even the dripping-pans of the people, were all of pure gold.

Far away to the south the white man was no stranger, and was, indeed, becoming master. The land birds which passed over the little vessels of Columbus, directing their flight to the southwest, for lack of any other guide, had brought those bold adventurers at early dawn on October 12, 1492, in sight of the naked people who lined the shore and gazed with wondering eyes at the strange creatures with great white wings, which floated on the sea.

¹Cooke's History of the People of Virginia, 2

Thus from the beginning of things the track was to the south, and those who afterwards followed their example of adventure, followed also this route: Cabot five years after Columbus, to the mainland; Cortes, in 1519, to the capital of Montezuma; Pizarro, four years earlier, to Panama on the Pacific side of the isthmus, and fifteen years later to plunder the peaceful inhabitants of Peru; Ponce de Leon, in 1512, landing at St. Augustine, in Florida; Americus Vesputius, and de Soto, were all far to the south.

On the other side, to the north, Cartier was on Labrador as early as 1534, and the next year sailed his French ships up the magnificent St. Lawrence, thinking himself still at sea and on the track of a short passage to the Indian Ocean. Cabot, too, had adventured as far north as the 56th or even the 58th degree of north latitude, and some say that he had even sailed up under the pole, and southward, also, as far as the present limits of Virginia.¹ But with all his sailing, in those early years of 1495 to 1498, along the New England and Virginia Coast, he only looked at the land from the sea. In all this time, and for many years more, no white man's foot had pressed the land that lay behind the Atlantic Coast between Mt. Desert and the Florida Settlements, the land which now, *par excellence*, is called America by all the world.²

But in 1583 Queen Elizabeth sent out Sir Humphrey Gilbert³ with an English ship, and for a mascot gave him a trinket in the shape of an anchor set with jewels, telling him that she "wished him as good hope and safety to his ship as if herself was there in person."

¹Early Voyages to America. Conway Robinson, 84

²Hudson and Champlain both made their voyages along the coast in 1609, two years after the settlement at Jamestown. Hudson was off the mouth of James River in August, 1609, but did not enter.

³The half brother of Sir Walter Raleigh, and his senior by thirteen years.

But neither the mascot nor the message brought good luck, for, having reached the island of St. John, Gilbert encountered a great storm, and went down with his vessel.¹

Sir Walter Raleigh followed quick upon the course of Gilbert by sending out, in 1585, a tentative colony under Sir Richard Grenville. These adventurers landed on Roanoke Island in Albemarle Sound, but they did not stay. In a little while they had enough of it, and all embarked for England with Sir Francis Drake, who was given to sailing those southern seas in search of Spanish argosies.

In 1587, Grenville made another landing at the same place, but while White, the governor, went back to England, leaving on the island, in good condition, eighty-nine men, seventeen women and eleven children, and among the latter his granddaughter Virginia Dare, the first child of English parentage born in America, the people all left the island and disappeared forever. The mystery has never been and never can be explained, the only intelligible mark left by them being that they did not go because they were in distress. Such an incident is a fertile source for surmise and has tickled the imaginations of many a weaver of fiction. Even the staid writers of history cannot pass it by without yielding a little more credence than they desired to the romantic possibilities of the story.²

So, after all, nothing permanent came of those attempts, and, besides the lost colony, the adventure only serves to remind us of the sad fate which befell its patron the great Sir Walter Raleigh, and of the fact that because his royal mistress was a Virgin Queen, the Old Dominion bears the name of Virginia.

¹Cooke's History of Virginia, 5.

²Old Virginia and Her Neighbours, Vol. I., 139. Cooke's History of Virginia, 6.

Not until twenty years later was there another attempt at a permanent settlement made on that unlucky shore. Then, John Smith, a plain man with a plain name, broke the back of fate, and did succeed in planting the first English Colony on American soil. Captain Christopher Newport commanded the fleet consisting of the *Discovery*, the *Good Speed*, and the *Susan Constant*; and Captain Bartholomew Gosnold, who commanded one of the vessels and was a wise man, was entitled to much of the credit for the ultimate success of the venture; but Captain John Smith holds the word, and is entitled to hold it, with both history and romance, for being the real founder of what became the State of Virginia, the first English colony in point of time, and the first to plant representative government on this continent.

Smith not only built a state, but he did that which an enemy has always wished his adversary to do, he wrote a book — perhaps too many of them. He had a fluent command of words, attractive descriptive powers, and possibly a little too much imagination; not being willing, apparently, to write anything that was not interesting. So *some do say* that all the things he wrote, especially about himself, are not to be taken without a grain or two of salt. There be some¹ indeed, of whom Smith himself would say that they were "little better than atheists,"² who even venture to deny the romantic story of his rescue by Pocahontas.

But Smith and Pocahontas did not want for a champion in history, for he was found in Mr. William Wirt Henry in his able and most interesting address delivered before the Virginia Historical Society in 1882. This

¹Mr. Charles Deane; Rev. Edward D. Neile, *History of Virginia Company of London*; Wm. Cullen Bryant; Henry Sydney Howard, *History of America*; Henry Cabot Lodge, *English Colonies in America*; and others.

²Works of Capt. John Smith, 386.

is a masterly defense by a master hand, and the soul of the antiquarian, even if he be a sceptic as to the leading and earliest of Virginia romantic tales, finds delight in its perusal.

But whether Pocahontas saved Smith or not, there can be no doubt that Smith saved Virginia, and that to him, more than to any other single man, is due the fact that this colonial venture did not share the fate of its predecessors at Roanoke. In view of this, it seems fortunate that Raleigh had already pre-empted the name, for many an eloquent peroration that ends so finely with an invocation to the great old state, would lose its effective force if, instead, it had to conclude with the explorer's name, "Smithonia."

Of Smith's claim to pre-eminence as the founder, Mr. Henry¹ says: "As his companions freely accorded to him the honor of being the founder of Virginia, now that his work has developed into such a power for the advancement of mankind, the world should freely accord him the great honor which is his due. His name, belittled by Fuller in its insertion among the 'Worthies of England,' should be enrolled among the 'Worthies of Mankind,' and he be forever assigned an honored place among the founders of great nations."

But Smith's claims to honor are not confined to Virginia. In 1614, he explored, with two ships, the New England coast, and made a map of the country between the Penobscot and Cape Cod.² In his writings he speaks of Massachusetts as "the Paradise of all those parts,"³ and among his most cherished titles, with which he took care to adorn the title pages of his books, was that of Admiral of New England.

¹Address, 58.

²Works of Capt John Smith, 699.

³*Id.*, 719.

Before Smith, Champlain had also explored the Penobscot, had entered Charles River and sailed around Cape Cod,¹ but yet before the Pilgrims came Smith had come, had landed in Massachusetts, and possibly had stood on Plymouth rock six years prior to the famous landing of 1620.

But this chapter concerns only the country where our reporters lived and worked, and only of so much of that as affects conditions existing about that time. To these matters we must return.

Many histories tell of the immediate causes in England which produced the Virginia venture; of the Charter which King James drew up; of his instructions to the adventurers, minute and most impracticable; and of the sealing them in a box and the opening of them off Cape Henry on April 26, 1607. These papers were the real foundation of constitutional government on this continent, though the wonder is that out of such beginnings so great a growth should come.

Smith was a restless explorer and a persistent map-maker. Eight days after the opening of the sealed box off Cape Henry, and in spite of the refusal of his companions to recognize his appointment to the dignity of councilor, which the papers showed he was entitled to, with Captain Newport and twenty others he went in a barge into the broad mouth of the Powhatan, afterwards ignobly called the James, with the purpose of exploring it to its source. The party sailed certainly as far as the Appomatox, and, unless the narrative includes two different expeditions, up to the falls, the head of navigation. On their way back, coming to a spot on the north bank of the river, where the water was so deep that the ships could lie near

¹New France and New England. Fiske, 53.

enough to the shore to be moored to the trees, they selected it as their place of settlement, and at once set some of the men to fortifying it, while the others kept watch.¹

This was May 14 (old style 3d), 1607, and they named the place Jamestown. For the location of a town hardly a worse selection could have been made, but with good fortune and bad, principally the latter, the town stood through ninety-two years, and if its commercial had to any extent approximated its historic value, it would have become a great city. In fact, it never was more than a small village, but there, said a distinguished Virginian,² "the old world first met the new. Here the white man first wielded the axe to cut the first tree for the first log cabin; here the first log cabin was built for the first village. Here the first village was to be the first state capital; here was the first capital of our empire of states. Here was the first foundation of a nation of free men, which has stretched its dominion and its millions across the continent to the shores of another ocean."

The story of Jamestown has been too often told to need repetition here,—the story of Indian fights and massacres, of starvation and abandonment, of its depopulation into the overflowing graveyard, and repeated replenishments; of burnings and rebuildings, of contentions and reconciliations, of bad governments and good, of Bacon's revolution, also called a rebellion, and punishments by hanging and imprisonment; of the final removal of the capital and abandonment for all time of the site, the seat of government for near a century. One occurrence, however, can never be told of too often,—the meeting of the first legislative

¹Cradle of the Republic. Tyler, 23.

²Henry A. Wise. *Id.* 21.

assembly, the first representative body on American soil, gathered in the little wooden church, in 1619, and of this we will speak when we consider the kind of government established in the land of which this chapter is meant to be a description.

For very many years the site of Jamestown was almost covered by weeds and marshes, and much of it has yielded to the lapping waves of the great river, which washes now over much of the most interesting part of the original settlement. But in recent years patriotic energy has made full atonement for past neglect. A sea wall protects what is left of the site from further depredation by the river. The accumulated dust and earth of more than two hundred years has been removed, and the foundation lines of the older churches, the State House, and little village houses, uncovered, fenced around, and protected by a coating of cement from further decay. To the old church tower, though claimed to be not the oldest in the land,¹ a pretty church has been added, preserving the old bricks found in the excavation. The ancient tombstones, protected by a permanent fence and held together by cement, continue to perpetuate the memories of those whose bones once lay beneath them, and to add greatly to the deep interest which must forever attach to the modest and homely spot where free government was born in America. But last, and by no means least, a fine statue of Captain John Smith has been erected upon the island, a most worthy memorial of a great man.

The Charter of April 10, 1606, which Newport brought with him across the sea, marked out the limits of that Southern Colony of which Jamestown was to

¹The Old Brick Church. Address of R. S. Thomas before the Virginia Historical Society. Vol. XI, 129.

be the capital. It was to be planted "anywhere between 34 and 41 degrees of north latitude, corresponding to the limits of North Carolina and the mouth of the Hudson River. It was to extend fifty miles north and fifty miles south of the spot selected for the settlement; one hundred miles into the land, and to embrace any islands within that same distance of the coast."¹ Between it and the northern colony there was to intervene as a sort of buffer, a zone one hundred miles wide. But by the Charter of 1609, the boundaries of the southern colony were much enlarged and made to embrace two hundred miles north and two hundred miles south of the mouth of the James River and to reach "up into the land from sea to sea."² Out of these designated limits both Maryland and North Carolina were subsequently carved,³ but not without much contention, some by law and some by force.

For boundaries, however, at this time, the exploring mind of John Smith cared but little. What he was bent on doing was to find out where the great rivers came from and to map them out. So on his first voyage, with Captain Newport in command, they set out in a "shallop" and "took five gentlemen, four maryners and fourteen saylours, with whome he proceeded with a perfect resolutyon not to returne, but either to find ye head of this Ryver, the Laake mentyoned by others heretofore, the sea againe, the mountaynes Apalatsi, or some issue."⁴

The first "salvage" encountered, from whom they were able to seek and obtain information, seemed to have in him some of the elements of a map maker

¹Cooke's History of Virginia, 15.

²*Id.*

³English Colonies in America. Lodge, 98, 133.

⁴Works of Capt. John Smith. Vol. I., XLI.

for the narrative says that he " offered *with his foot* to describe the river to us," but they gave him a pen " and he layd out the whole river from the Chessean bay to the end of it so farr as passadg was for boats."

After this first trip there were many other voyages, especially up the " five faire and delightful navigable rivers " on the west side of the bay.¹ He makes it plain that he saw the " falles, rocks, shoales, etc.," of the James at Richmond, " which makes it past navigation any higher;" the river called " Chickahamini;" the " Pamaunkee;"² the " Payankatanke;" the " Toppahanock;" the " Patowmeke;" " six or seven myles in breadth," and navigable one hundred and forty miles, and which divided " it selfe into three or four convenient branches;" the " Pawtuxent," and at the end of the bay, the best of which coming from the northwest " we could not get two miles up it with our boat for rocks." This was probably the " Sasqusahanough," and the other branches are evidently the Elk, the Sassafras and the inlet in the direction of northeast, for while he traces them on his map he does not, as in the cases of the other rivers, give the Indian names. The names given are not always spelled the same way, but, caught by Smith from sound and written on his maps, they are generally near enough like the names those rivers bear at the present day to be readily recognized.

In spite of great hardships, a very meagre equipment, fully two hundred miles from the settlement, " with but twelve men to performe this Discovery, when we lay above twelve weeks upon those great waters in those unknowne countries," Smith brought back with him notes enough to enable him to make his great

¹Works of Capt. John Smith, 346.

²The York.

map, and at last to have it "graven by William Hoole," and with it to have printed at Oxford, "by Joseph Barnes, 1612,"—"A Description of the Country, The Commodities, People, Government and Religion."¹ This map is a marvel of accuracy, and after the manner of the day it is ornamented with scrolls, an elaborate picture of the compass, a "salvage" with his bow, quiver and club, and a picture of King Powatan with his chiefs and ladies, all in light attire, and an inscription showing that he "held that state and fashion when Captain Smith was delivered to him prisoner, 1607."

It was up along these rivers, except those branches of the bay mentioned, and along the rivers that crossed between them, running north and south, that, after Jamestown became a settled fact, settlements and plantations crept, going higher up and spreading further back into the forest along the branches and feeders of the greater streams; the planted ground and simple homes drawing back as Indian massacres and other calamities befell them, and then, when peace and quiet came again, venturing even further up and further back than habitations had been built before.² These rivers were the highways of the young country. There were no cities nor great wharves at which the ocean ships could make a stopping and gathering place, but up to the very plantations, or at points convenient to several of them, the trading vessels sailed, and either anchored out in the streams or tied up to the banks and took on for their homeward voyages the products of the country, tobacco, lumber, clapboards, hides, and later, grain; and on the returning western

¹Works of Capt. John Smith, 41.

²The maps show by their shadings the progress of the settlements to the years 1619-1652 and 1729, which last date is about the time of the cases reported in this volume.

voyages they brought clothing, furniture, glass, china, silverware, paper, groceries, liquors, books, and the thousand and one things that a refined civilization, though planted in the woods, demanded. At so early a stage this creeping growth had gone so far that when, in 1619, the first assembly met at Jamestown, eleven boroughs from up and between the rivers were represented by twenty-two members;¹ but at that time the country had not yet been divided into shires, or counties.

In that attractive account of early Jamestown, so well entitled the "Cradle of the Republic,"² opposite page 120, is printed a chart of the James River for the one hundred and ten miles from Point Comfort (Old Point now) to the site of Richmond, which shows the early settlements and the thirteen counties which lie along the river banks on either side. Four of them stretch across the peninsula to York river on the north, and it was in this territory, in the counties of the eastern shore, and in those which were later formed along the Rappahannock and Potomac rivers,³ that the early Virginians lived and made its earlier colonial history; and it was more than a century after the founding of Jamestown before white men climbed the mountain range that lay so close to them and looked down upon the beautiful valley of the Shenandoah from its eastern side.

First, along the James great plantations were established, and, after a while, fine mansions lined the banks and many of them are there today. Then, along the

¹But two of them were denied their seats because the patent of the land they represented exempted the owner from obedience to the laws and authority of the colony except in matters of defense. The Legislature of the Province of Virginia. Elmer I. Miller, Ph.D., 22.

²Lyon Gardner Tyler, LL.D., President of William and Mary College.

³The map which is the frontispiece to Cooke's History of Virginia gives all the early counties.

banks of the York, the Rappahannock, and the Potomac, and the tributary streams, there was a similar growth. Trees were cut down or girdled, fields were planted, and houses which at first were mere shelters, gave place to better houses, and these, in turn, gave place to residences which deserved the name of mansions. And as the country thus grew up and the wild beast and the wild man were superseded by domestic animals and the representatives of civilization, the reign of law, feeble at first, then severe and exacting in its requirements, grew in an almost equal proportion. But westward and away from the navigable rivers the settlement of the country had been extremely slow. The Appalachian range, our now familiar Blue Ridge, does not in its whole length through Virginia average a distance of one hundred and fifty miles from the bay. In his exploring expeditions up the Potomac, Smith and his party were at one time within fifty miles of the mountains, and in his first voyage up the James one of the possibilities aimed at was to reach "the Mountaynes Apalatsi." And yet, so adventurous and courageous a people as those who lived along the great rivers of the lower country permitted one hundred and nine years to pass from the first settlement at Jamestown, before any party of white men had climbed the mountain and looked upon the splendid prospect that lay beyond it. The story of Spotswood and his Knights of the Golden Horseshoe, who ascended the top and went down into the valley beyond, in 1716, is among the most interesting and attractive of the tales of adventure of those early times.¹ 1927718

"It delighted them to cross the mountains" they engraved in Latin upon the golden horseshoes which were the souvenirs of this expedition, and yet two

¹Scott's History of Orange County, 98.

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years before this, Spotswood, the "Tubal Cain" of Virginia, had settled a colony of Germans, as iron-makers, within less than fifty miles of the mountains, before their distinguished proprietor, or any one else, was sufficiently enthused to undertake to solve the deep mystery which lay behind the blue hills where they saw the sun set every day of their lives.¹

Not even a hunter, or an adventurer on his own account, seems to have crossed the Blue Ridge earlier than 1716,² although quite a strong case is made in favor of one John Lederer, said to have once been a Franciscan monk, that as early as 1669 and 1670 he explored the Valley of the Shenandoah, and there are not a few who give full credit to the story of this transmontane Columbus.³

But so it was, that when Spotswood had once looked over the summit of the Blue Ridge the multitude soon followed after, and through the northern end of the valley from Maryland and Pennsylvania, and by all the gaps of the mountain, settlers moved in in small and large parties, the Germans occupying the lower valley up to the Augusta County line, except the eastern part of the lower or north end, where English people came, but the Scotch-Irish occupied largely Augusta and the territory beyond, to the south and southwest.

Comparatively rapid as the progress of the settlement of the Shenandoah Valley and the Southwest was, when it is compared with the tardiness of the tide water people, or people to the north, in commencing it.

¹Col. Wm. Byrd (Writings of Byrd-Bassett, page 180) as early as 1728 speaks of the prospect of undertaking an exploring expedition to the country beyond the mountains.

²*Id.*, 100. But some must have entered its northern end much earlier, for there is strong proof of the existence there of a stone, marking the grave of a woman and bearing the date, 1707. Planting of Presbyterianism. Graham, 14. *Id.*, 12.

³The German Element of the Shenandoah Valley. Wayland, 11.

yet these settlers too, were far from being exempt from the dangers and difficulties which such an enterprise must always encounter in a new country. But the prairie character of the valley lands and their comparative freedom from heavy timber, caused, it is thought, by the repeated fires with which the Indians had, through countless ages, cleared this hunting ground for pasture for the game, made less difficult the fight with nature; and the population to the north, having no mountain to cross, pressed so steadily into the valley that by the time of the American revolution, about sixty years after Spotswood's expedition, the valley and the southwestern parts of Virginia were a comparatively well settled country. The advance into that part of Virginia that lay beyond the Alleghanies was slower still, and it has only been discovered in comparatively recent years that the dream of mineral wealth which enticed so many to cross the ocean a hundred years before, might have been realized in the land that lay between the Ohio River and the Alleghany Mountains.

Some visitors to the valley¹ in the early period of its settlement, give us too graphic accounts of conditions there about the times of the making of the reports, of which this writing is an introduction, to be entirely passed over here.

Certain Moravian missionaries from about Bethlehem in Pennsylvania, on their way to North Carolina and Georgia, passed through the valley from its northern to its southern end in the fall and winter of 1743. They have recorded that on the 18th of November they came to the "Potomick" where it separates Maryland from the valley, and, pursuing their journey, they came, two days after, to the house of "Jost

¹Virginia Magazine. Vol. XI., 373.

Hayd,"¹ about six miles from Frederick Town (Winchester), and, asking him the way to Carolina, he told of "one which was for one hundred and fifty miles through Irish settlements," by which he meant the land of the Scotch-Irish—the upper or southern portion of the Shenandoah Valley. But the missionary says in his diary, "I had no desire to take this way;" probably because he could not preach intelligibly to the Scotch-Irish in his German tongue,² or, possibly, because he feared the same sort of opposition to his religious views that he had encountered in other portions of the country.³

Not ten years later Moravian missionaries from the same place did travel all along the valley, constantly in sight of what they describe with enthusiasm as the "Blue Mountains," from the "Potomik" river all the way up (south) to "Augusti Court House" and beyond, through the very midst of the "Irish," and while they found that "the bad road begins there," yet the people were "very friendly and regretted that they could not help us";⁴ but the diary makes no mention of any preaching, something that no difficulties of a physical nature seem ever to have deterred them from doing.

On this trip, however, leaving the "Irish" far to the west, the missionaries crossed the Blue Ridge and pursued their journey along the eastern side. The diarist says that he crossed the "Tschanator" (Shenandoah) into Eastern Virginia and by the 25th of the

¹He spelled his name "Heydt," but being pronounced Hite, others so spelled it, and his descendants for nearly a hundred and fifty years have so written it. The missionary describes him as "a rich man, well known in the region. He was the first settler here," *Virginia Magazine*, Vol. XI, 373. For a full account of Jost or Joist Hite, see the April number, 1903, of the *West Virginia Historical Magazine*.

²Note of J. A. Waddell, *Virginia Magazine*, Vol. XII., 202.

³The "Irish" came from Pennsylvania and so did the Moravians, and the former were there regarded as "pugnacious." See *post*.

⁴*Virginia Magazine*, Vol. XII, 147.

month had crossed the "Repehenick" (Rappahannock) and stayed all night not far from Germanna in Orange County, which was near the site of the iron-making enterprise of Col. Spotswood. There, he says, he was "told of an English minister¹ living in the country, who receives sixteen thousand pounds of tobacco, and a German minister who gets eight thousand pounds. He has also nine negroes and a fine plantation." These facts seem to have shocked the worthy Moravians,² for the immediate comment of the diarist is "we were silent, drying our clothes and other things."

The other visitor, at about the same date, was George Washington, who too kept a diary of his journey beyond the Blue Mountains in 1747-48. He was just sixteen years old, and the object of his expedition was to make surveys for Lord Fairfax, who employed him in this business for several years.

After arriving at "Greenway Court," the hunting lodge of Fairfax, about twelve miles from Winchester, Washington notes³ that "we sent our baggage to Captain Hites,⁴ near Frederick Town."

After making a number of surveys for settlers in what is now Clarke County, where he stayed at a house at which he was obliged to sleep on a bed on which there was not "anything else but only one thred Bear blanket with double its weight of Vermin such as Lice, Fleas, etc.,"⁵ he traveled on to Frederick Town (Winchester) "& took a Review of y Town & thence reurned to our Lodgings where we had a good Dinner prepar'd for us Wine & Rum Punch in Plenty & a

¹Rev. John Thompson, who on November 9, 1742, had married the widow of Governor Spotswood. *Virginia Magazine*. Vol. XI

²For other journeys of these self-sacrificing people through the valley, see *Virginia Magazine*. Vol. XII., 134, 202, 271.

³*Journal*, 24. Edited by Dr. J. M. Toner.

⁴The "Jost Hayd" of the missionary.

⁵*Journal*, 26.

good Feather Bed with clean sheets which was a very agreeable regale."

From Winchester, Washington went up to the south branch of the Potomac, where he made numerous surveys, going at one trip "about 40 miles from Polks I believe y worst Road that ever was trod by Man or Beast."

The field notes taken and accurately preserved in his diary, show a considerable movement of people over into that remote section, and although he says of some of them that near the mouth of the south branch he "was attended by a great company of People men women & children that attended us through ye woods as we went showing there¹ Antick tricks I really think they seem to be as Ignorant a set of People as the Indians they would never speak English but when spoken to they speak all Dutch," yet it was for these people that he was surveying the land, and, ignorant as they were, they were intelligent enough to desire to have good titles to their property and well and distinctly defined limits to their farms.

This trip took from March 14 (from Winchester) to the 11th of April, on which day "we travell'd from Codays down to Frederick Town where we reached about 12 oClock we dined in Town and then went to Capt Hites & Lodged."

Just one hundred and fifteen years later, about one o'clock in the morning, a boy soldier, tired and hungry, who knew the place well and wanted to get from its occupants something to satisfy his hunger and thirst, left the column of troops that was moving in the night slowly along the road, and tried to open the gate that led into the yard of the stone house that "Jost Hayd "

¹The writers of the day were, as a rule, not remarkable for good spelling and seem altogether averse to punctuation

had built.¹ Finding that something prevented the gate from opening, and looking down to discover it, he ascertained that it was a dead soldier, of his enemies, with his head close to the gate and a rifle ball through it, while close to his head was a hole in the panel of the gate through which the ball had passed. These soldiers had been fighting in the dark about some questions growing out of the government which the young George Washington later had been the chief figure in founding, and, besides the man at the gate, there were others, dead and wounded, behind the lilac hedge which shut off the road, along which the troops were marching in the night, from the house that "Jost Hayd" had built, and which had sheltered both the Moravian missionary and George Washington. There is a not very remote association between these events, but that is another and a longer story.

So it was, that about this time land purchases and speculation, questions of titles, the making and breaking of contracts, both in the old, or what Rev. Hugh Jones, in his contemporary narrative, calls "the ancient and best settled colony," and in that much newer part so rapidly opening and filling up, were sending grist to the mill of the courts at Williamsburg, in the shape of suits; and Barradall and Randolph were writing down the decisions of them, that future courts might be guided by them, but of which, indeed, we find that they took but little heed.

The opening up and development of the southwestern parts of the state, and of that portion which lay beyond the Alleghany Range, out to the Ohio River,

¹In 1752 Hite, or his son, built a new stone house, to which wings and a large colonial porch were added by a subsequent owner, and so the house stands today. In 1862 the original house where Washington lodged was still standing and used for negro quarters. It was of stone, a story and a half high, and built against a bank.

was naturally slower than that of the valley had been. The advantage of the valley country in point of proximity and accessibility to the older settlements determined this. But it was many years before the extent of the mineral wealth and the value of the fine pasture ranges of these sections were understood and appreciated. The Southwest however, followed close upon the Valley in acquiring a white population, which, as in the valley country south of Rockingham County, was largely of Scotch-Irish nationality. In spite of the lapse of nearly two centuries, and of the mixing and assimilation of populations by marriage, emigration and immigration, each of these sections of the state retains in large degree the characteristics that distinguished them at the beginning. These are most notably observed in the names of families and in their political and religious affiliations.

CHAPTER III

THE PEOPLE

There is not much to be said here of the Indian people, or of the negroes, except so far as the colonial laws bore directly upon their conditions, for they had no hand in making the laws. They were governed, but they did not govern. The real people of the colony, who effected its permanent status, were the gentry and the commons, with the recognized distinctions between them brought over from England, somewhat modified by associations among a new people in a new land.

These were the people who first cut down the forest trees; who legislated and adjudicated; the landowners and the tenantry; the great planters and the small; professional men and mechanics; employers and laborers,—all of whom from time to time made contracts, and sometimes broke them.

It was by them and for them that the laws of the colony were adjusted from what they were at first when England sent them over, as from time to time England permitted or could not prevent their modification by the colonial people to suit conditions that England had no very realizing sense of; for, indeed, England's foot-rule did not always measure just twelve inches in her dealings with her American colonies.

Among the people that came over with Newport and Capt. John Smith in 1607, and with the subsequent supplies, up to 1609 and beyond, there were, for the success of such an expedition, quite too many "poor gentlemen," being in the proportion of five to one to tradesmen and mechanics, and among the five there

were, no doubt, adventurers of a low type who left their country for their country's good.¹

More than half of those who came in the first voyage with Newport and Smith had never used an axe, though, under necessity, they learned to do so effectively.² Among them were jewelers, gold refiners and a perfumer; a strange band to found an empire in the wilderness.³ Of them, Capt. John Smith said: "Ten good workmen would have done more Substantial worke in a day than ten of them in a weeke."⁴

When Smith left Virginia, in 1609, there were about five hundred people, men, women and children, in the colony, of whom about two hundred were trained to fight the Indians, but nearly all of them soon perished.⁵ But more ships came, with more people of an improving sort. Near a hundred maidens, poor but modest, were sent over for wives for the settlers, and, naturally, they went like hot cakes. King James too, in his *wisdom*, sent about an equal number of convicts, but the folly and wickedness of this was to some extent neutralized by the settlers scattering them to distant plantations and making them work.⁶ Not a few men came "indented" to serve as laborers or servants for a term of years,⁷ and in 1619, the year of the establishment of free representative government, came also Pandora's open box, in the shape of a Dutch ship with twenty negro slaves. Not much was thought then of this little importation, but more came, and they increased so in numbers, by births and importation, that about the year 1700 there were twenty-three

¹English Colonies in America. Lodge, 5.

²Economic History of Virginia. Bruce, Vol. I, 196.

³Cooke's History of Virginia, 18.

⁴Capt. John Smith's Works. Preface, XIV, page 486.

⁵Cooke's History of Virginia, 77, 80.

⁶*Id.*, 200.

⁷*Id.*, 122-147.

thousand negro slaves in a population of ninety-five thousand, in Virginia alone.¹ Of the seventy-two thousand whites six thousand were servants,² so there were twenty-nine thousand of the menial class, to sixty-three thousand white men of the higher classes.

After the execution of Charles I, in 1649, quite a body of distressed cavaliers came to Virginia, and through all the time of the Commonwealth in England there was a steady stream of immigrants of this class.³ While some of these had saved something from the wreck of their English fortunes, many of them were poor. Most of them were of good, and many of them of high social position and rank in the old country. They distinctly impressed themselves upon the colony, then and their descendants thereafter, for from them came such men as Washington, Mason, Pendleton, the Lees, the Randolphs, Carys, Madison, Monroe, the Lunsfords,⁴ and many others.⁵ In straight line from this ancestry, were Jefferson, Marshall and Robert E. Lee, with a common grandfather not very far back; and of the same stock were very many of the fighting and marching men of Lee's armies, even those who fought in the ranks.

About the year 1700 came also another immigration of men of fine rich blood, some of the Huguenots from France. Among them were the Maurys, Flournoy's, Jouets, Moncures, Fontaines, Maryes, Bertrands, Dabneys, Bowdoin's, and many others, whose names and the high qualities shown by their descendants in private and public life, avouch their ancestry from those men of worth who came over in 1685. The vestry

¹Old Virginia and Her Neighbors. Fiske, Vol. 2, 169.

²Cooke's History of Virginia, 228.

³Old Virginia and Her Neighbors. Vol., 2, 169.

⁴Virginia Magazine. Vol. XVII, 26, 32.

⁵Cooke's History of Virginia, 229.

book of Bristol Parish¹ contains many names of Huguenot families, and is full of interest to those who love to turn these old furrows.

Of this cavalier population Mr. Fiske² says: "There can be little doubt that the cavaliers were the men who made the greatness of Virginia. To them it is due that her history represents ideas and enshrines events which mankind will always find interesting."

But the population of Virginia in colonial times, worthy of mention, is not, by any means, confined to the "first families." This class of the people was, indeed, necessarily in the minority, for in the eighteenth century the majority of the white people was made up of the longshoremen of the tide-water section, the merchants or factors of the villages and crossroads, the small planters, tenants of the large landholders, ministers of the established and dissenting churches, the large frontier population of the Southwest, and, after 1720, the Scotch-Irish and German settlers of the Valley, of the Southwest, and west of the Alleghanies, though among them all there were not a few of cavalier descent, whose descendants by marriage through the female side have lost the names and often the memory of their more aristocratic ancestry.

Many, especially of the families living upon the edge of civilization, and those on or near the mountains, where very cheap lands could be had, and of some of whom Washington gives a graphic and by no means complimentary description,³ were very rough and uncouth, but the small landholders, who were merely planters on a small scale, because, being freeholders,

¹Transcribed and published in 1898 by Churchill Gibson Chamberlayne. See, also, Huguenot Emigration to Virginia. Vol. V. Virginia Historical Society Collection.

²Old Virginia and Her Neighbors. Vol. 2, 28.

³Ante page 40

they had the right to vote, were most important factors in the public, that is, the economic and political, interests of the day. Of small beginnings in many instances, sometimes the tenants of the larger landholders by thrift and enterprise improved their pecuniary conditions, and by education and refinement they acquired and deserved the kind of social position which Virginians, especially, have always regarded as adding much to the pleasure of life.

Of this part of the population, Cooke says:¹ "The impression that this class were men of inferior character, having a great jealousy of the planter, has nothing whatever to support it. . . . The proof is everywhere seen in the old records that the planter and the small landholders lived in entire harmony, and had a mutual respect and regard for each other. They opposed Berkeley together, and fought side by side under Bacon, stood shoulder to shoulder in the Revolution, and as neighbors and fellow-citizens were associated and worked together for issues as dear to one class as to the other."

It is true, however, that in the first half of the eighteenth century what is known as *society* was chiefly made up of the planters, professional men, merchants, their kin, connections, and close acquaintances, ministers, teachers and the like.

The Rev. Hugh Jones, who is described as "the distinguished professor of mathematics in the College of William and Mary," who preached at Jamestown in 1719, was chaplain of the General Assembly and lecturer at Bruton Church, holding also important clerical charges, and who died in 1760 at the age of ninety-one, published, in 1724, a valuable work called "The Present State of Virginia." Of what he wrote

¹History of Virginia, 368

on this subject Howe,¹ the historian, whose quotation from Mr. Jones' book is repeated here, says of his rather florid description of the people of the colony, that "he appears pleased with everybody and everything around him," and then quotes this on the subject we are considering: "The habits, life, customs, computations, etc., of the Virginians, are much the same as about London, which they esteem their home, and, for the most part, have contemptible notions of England and wrong sentiments of Bristol and the other seaports, which they entertain from seeing and hearing the common dealers, sailors and servants that come from these towns, and the country places in England and Scotland, whose language and manners are strange to them. For these planters, and even the native negroes, generally talk good English, without idiom or tone, and can discourse handsomely on most common subjects. Conversing with persons belonging to trades and navigation from London, for the most part they are much civilized and wear the best of clothes, according to their stations, nay, sometimes too good for their circumstances, being for the generality comely, handsome persons of good features and fine complexions,—if they take care—of good manners and address. The climate makes them bright, and of excellent sense and sharp in trade; an idiot or deformed native being almost a miracle. Thus they have good natural notions, and will soon learn art and science, but are generally diverted by business or inclination from profound study and prying into the depths of things; being ripe for management of their affairs before they have laid so good a foundation for learning and had such instructions and acquired such accomplishments as might be instilled into such

¹Virginia, its History and Antiquities, 330.

naturally good capacities. Nevertheless, through their quick apprehensions they have a sufficiency of knowledge and fluency of tongue, though this learning for the most part be but superficial. They are more inclinable to read men by business and conversation than to dive into books, and are, for the most part, only desirous of learning what is absolutely necessary, in the shortest and best method. . . . As for education, several are sent to England for it, though the *Virginians*, being naturally of good parts, as I have already hinted, neither require nor admire as much learning as we do in Britain; yet more would be sent over, were they not afraid of the small-pox, which most commonly proves fatal to them. But, indeed, when they come to England, they are generally put to learn to persons that know little of their temper, who keep them drudging on what is of least use to them, in pedantick methods too tedious for their volatile genius. . . . If New England be called a receptacle for dissenters and an Amsterdam of religion, Pennsylvania a nursery of Quakers, Maryland the retirement of Roman Catholics, North Carolina the refuge of runaways, and South Carolina the delight of Buccaneers and Pyrates, Virginia may be justly esteemed the happy retreat of the Britons, and true churchmen for the most part; neither soaring too high nor dropping too low, consequently should merit the greater esteem and encouragement.

"The common planters leading easy lives, don't much admire labour, or any manly exercise, except horse-racing, nor diversion, except cock fighting, in which some greatly delight. This easy way of living, and the heat of the summer, makes some very lazy, who are then said to be climate-struck. The saddle horses, though not very large, are hardy, strong and

fleet; and will pace naturally and pleasantly at a prodigious rate. They are such lovers of riding that almost every ordinary person keeps a horse; and I have known some spend the morning in ranging several miles in the woods to find and catch their horses, only to ride two or three miles to church, to the courthouse, or to a horse race, where they generally appoint to meet on business, and are more certain of finding those that they want to speak or deal with, than at their homes. No people can entertain their friends with better cheer and welcome; and strangers and travellers are here treated in the most free, plentiful and hospitable manner, so that a few inns or ordinaries on the road are sufficient."

This narrative statement of contemporary conditions, comes nearer to being the testimony of a witness, though a rather willing one, than the record of a historian. Corroborating circumstances, too, prove it to be a fairly good picture, certainly well drawn, and taken from several points of view.

But there are historians who have gleaned carefully in those old fields, and the most of what they say and their most attractive stories are of later times than those of which Mr. Jones wrote, yet the collective narratives are all consistent and serve to light up the picture which Jones has drawn.

We read¹ of a country of great estates, entailed as in England, and worked by slaves and indented servants; without free schools or newspapers "to make poor people dissatisfied"; of education in the earlier times generally derived from the tutorship of ministers; of conformity of worship enforced by law:

¹Cooke's History of Virginia. Old Virginia and Her Neighbors, Fiske. Williamsburg, Tyler. Social Life of Virginia, Bruce. First Republic in America, Brown. Old Churches and Families, Meade.

of attendance upon church services under the penalty (by the statute) of fines; of life in the country, tranquil and free from worry and, comparatively, from care; of unlimited hospitality; of the gentry sitting as magistrates, burgesses, councilors and as such even as judges in the General Court, and later a practically self-perpetuating body, in the county courts; of intense loyalty to the King, but with the most determined insistence upon representative government, individual freedom and home rule; of fine riders on fine horses over bad roads; of barges rowed or sloops sailed on the broad rivers, the oars manned by slaves who had little use and no desire for freedom; of horse racing and attendance on the monthly courts, where men meet for business and to discuss the crops, or sometimes to grumble over some real or fancied public grievance; of a strong partisan feeling for the church, and much enmity towards both Puritans and Papists; of intolerance towards all dissenters and, after a while, equal intolerance by the dissenters against the churchmen; of sweet and attractive family relations where the head of the house was almost as a feudal patriarch; where wine and sherry and canary were drunk at every gentleman's table, and there was none in the land to think it wrong; of great open fires in yawning chimney places; of fine coaches and fine clothes, — silks and laces and all else of luxury that England could send back on the ships in exchange for tobacco; of sports in the hunting fields, fox hunts, and shooting on the rivers and in the woods. Then we read of brave displays on public occasions, of a governor driven from his palace to his capitol in a superb coach drawn by six milk-white horses; his dress "a very handsome rich costume and his coat, which was of a light red colour, was heavy with gold thread tissue."

Then of the assemblage to do honor to the King's representation, of much that was great, and more that was fair to look upon, gathered from plantations along the river banks and crowding to the little capitol in great coaches over the rutty roads, or brought by barges on the streams; of dancing and feasting, and of both the triumph and despair of lovers,—such as without change, except in environment and degree, the world has always seen and will ever continue to see. The residences, even of the largest and richest planters were generally of wood with brick chimneys and underpinning, the houses being low and spreading over much ground with expansive wings. The halls were large, and there were many sleeping chambers to meet the demands of hospitality. The library¹ held many books, largely of the classics and without the changes which the flood of publications of modern times creates. The beds had hangings and mosquito nets, “with the finest linen sheets, and very often with silk counterpanes, whilst the sides were adorned with valances of gold and silver texture.”² There were couches covered with Russian leather or Turkish cloth, and chairs with seats and backs of the same material. The floors were covered with carpets and the windows shaded by curtains. Sometimes the walls were adorned with tapestry, and the faces of the fairest of women and the bravest of men, often a long line of ancestry, looked down from their frames upon their descendants, where entailed lands and abundant resources in what was, after all, a very simple life, assured the continued possession of estates in the same families for many generations.

In the dining room were tables of various patterns;

¹See *post*, Chapter VIII. Education

²The Social Life in Virginia, 160.

open cupboards with liberal displays of plates and dishes; the commonly used utensils of pewter, though there were dishes, cups, mugs, bowls, castors, spoons, etc., of silver.

For amusements there were musical instruments, "the virginal, the hand lyre, the fiddle and violin, flute and hautboy,"¹ and there are few of the older people of today who have not seen the thin-legged spinets of generations ago stored in the garrets.

The wealthier class got their clothes from England after the fashions of London; silk stockings, black hose, red slippers, sea-green scarfs, felt hats, doublets, and even gold belts and swords. There came a law² against such finery, but the finely finished shirt, the lace ruffles protruding from the sleeves, the parti-colored vests,³ the coats of broadcloth or plush dyed an olive color, neck cloths of the finest holland or muslin, shoes with shining brass, steel, or silver buckles, lace handkerchiefs and the like, were stronger than the law, and defied it, as it will always be a venial offense to defy most merely sumptuary legislation.

But if the men dressed so, what of the women? Let me quote the attractive and instructive writer from whom I have culled most of these facts of colonial domestic life: "The dress of the ladies was even more remarkable for fineness of texture and beauty of aspect. There are innumerable references in the inventories of personal estates, of silk and flowered gowns, bodices of blue linen or green satin; waistcoats, bonnets and petticoats trimmed with silk or silver lace; sarsanet and calico hoods, scarfs of brilliant shades of colour,

¹The Social Life in Virginia, 104.

²*Id.*

³Washington was married in "a suit of blue cloth, lined with red silk and ornamented with silver trimmings, a waistcoat of embroidered white satin, knee buckles of gold, and powdered hair." Virginia Historical Collections. Vol. XI, 117.

mantles of crimson taffeta, laced and galooned shoes, silk and golden stomachers, and fans richly ornamented." From a number of inventories of the wardrobes of different ladies, we find such articles of finery as "a scarlet waistcoat trimmed with silver lace, a sky-coloured satin bodice, and a pair of red paragon bodies, . . . a printed calico gown, lined with blue silk, a white striped dimity jacket, a blue silk waistcoat, a pair of scarlet sleeves with ruffles, and a Flanders lace band." There was also a proportionate accompaniment of jewelry—of gold, pearls, rubies, rings of all descriptions, some diamonds, amber necklaces, and gold and silver bodkins for holding together and decorating the hair.

These are the pictures of the richer classes. The poorer people lived in more modest houses, and as was the fashion of that day, made apparent the distinctions of social rank by marked differences in their apparel. But while that was the day of jealous regard for personal freedom, it was the day of legally recognized class distinctions, as it was the day when no man had yet suggested that there was even an inconsistency between all this and holding black men in slavery.

The occupations of the people were, necessarily, principally agricultural. In the early years of the settlement necessity compelled the cultivation of corn, and the imported stock, especially hogs, did well, and these conditions improved as the country was cleared up and regularly cultivated with better implements and methods. Wheat at first failed, but later its cultivation was so successful that it became, as early as 1643, an article of export. Flax and hemp were raised and linen of a good quality made in the colony, but it was a long time before wool sufficient for domestic use was produced. Silk husbandry was

tried without great success, and wine making with but little more. Tobacco became very soon the staple of the country, and amid many fluctuations in its market value it held its own, being the currency of the country, and, perhaps, as unsafe a standard, because of its instability, as could have been selected.

Iron-making on a small scale was tried with but little success in many parts of the country. When tobacco as a currency had, by its total inadequacy for that purpose, irritated the colonists into a partial trial of fundamental financial principles, minor coins were made, but the face value of the coin having little regard to its actual value, the law had to be invoked to prescribe the legal rates at which it should pass, with the imposition of fines for the refusal to accept it at what its false face imputed it to be worth.¹ By degrees, coins from England, Spain and Mexico came into limited circulation. These and the coins from France, Portugal, Spanish America, and even Arabia,² bore different values, and, consequently, debts were contracted to be paid in specific kinds of coins, and the distinction between pounds sterling in gold and in silver was regarded in every deal. Prices varied in quite large proportions between payments in English and Virginia currency, and a preference was also given to New England money.³

While the chief business of the country was agriculture, yet all the ordinary trades were represented, and ship and boat building to quite a large extent. Dr. Tyler⁴ mentions among the residents of Williamsburg, store keepers, jewelers and goldsmiths, doctors, lawyers, ordinary keepers and teachers, and, as was

¹Economic History of Virginia. Bruce. Vol. II, page 505.

²*Id.*, 513.

³*Id.*, 515.

⁴Williamsburg, 57.

to be expected in a college town, there were naturalists and scientific men.

But with it all, so far as the written laws were concerned, there was a stern and severe paternalism. Morals, religion, prices of commodities, the fees of lawyers, the wages of laborers and the manners and behavior of the people were at least attempted to be regulated by statute, with a confidence in the infallibility of such interference with economic and natural laws that oft repeated and disastrous experiences took many years to shake.¹

¹This subject of "The People" is further treated in the chapters on "The Church," "The City," "The Courts" and "Law and the Lawyers," as it relates more peculiarly to those branches of this introduction.

CHAPTER IV

THE GOVERNMENT

By 1607, Queen Bess was dead, and James of Scotland, the son of her most unforgiven and unforgotten enemy, Queen Mary, reigned in England in her stead. Among the other superstitions, such as witchcraft and the like, which had come to James, both by education and inheritance, was a profound conviction of the divinity of Kings. On this rock he hoped to found an empire in the new land beyond the sea, and all that he did to this end was consistent with that belief.

An eminent writer of English history¹ has given this uncomplimentary but graphic description of Elizabeth's successor: "His big head, his slobbery tongue, his quilted clothes, his rickety legs, his goggle eyes, stood out in grotesque contrast with all that was recalled of Henry or Elizabeth, as his gabble and rodomontade, his want of personal dignity, his coarse buffoonery, his drunkenness, his pedantry, his contemptible cowardice. Under this ridiculous exterior, however, lay a man of much natural ability, a ripe scholar, with a considerable fund of shrewdness, of mother wit and ready repartee."

The writer moreover says of James that he was dubbed "the wisest fool in Christendom," and that "he had the temper of a pedant, and with it a pedant's love of theories, and a pedant's inability to bring his theories into any relation with actual facts." And he proved all this by his preparation and recipes for a government of the colony which he was to found, as shown by the charter of 1606,

of which he was practically the author. This paper, dated April 10, 1606, provides for the establishment of the southern colony of the London Company, between thirty-four and forty-one degrees of north latitude. The colony was to be governed by a council of thirteen persons, of whom, however, only seven were named.¹ These were to choose their own successors, to elect annually their president from among their own number, to fill vacancies as they might occur in their body, and, for cause, to remove any member. This body was to be under the management and direction of a council of thirteen in London, but practically the Virginia Council was to be governed by the King in person.

The council was given very large powers, but the right to punish offenders against other friendly states was reserved to the crown, and to the King were to be sent such as should try to seduce the allegiance of any from crown or church. The christian religion was to be preached to the Indians; land was to descend according to the English laws of inheritance; a jury was to be required in capital cases unless the accused stood mute, but the council was to act as a court of last resort, as well as of original jurisdiction, in all other cases; murder, manslaughter, incest, rape, adultery, and dangerous tumults and seditions were punishable with death; religion was to be in accordance with the forms and doctrines of the Church of England; power was given the company to coin money, and to collect a revenue for twenty-one years from all vessels trading to their ports; a community of goods was established, and for a term of years the colony was to be free from taxation.² For minor

¹Howe's History and Antiquities of Virginia, 23.

²English Colonies in America.

breaches of its ordinances the council could by a majority vote, inflict such penalties as fines, imprisonment, and reasonable corporal punishment. The judicial proceedings were to be conducted orally, but a record was to be made of all cases decided by the court.¹ Persons convicted of capital charges could be reprieved by the council, but they could only be pardoned by the King.²

One important clause in the charter became the text of many a political sermon from 1770 to 1776, that "who(ever) shall dwell and inhabit within every and any of said several colonies and plantations, and every of their children . . . shall have and enjoy all liberties, franchises and immunities within any of our other dominions, to all intents and purposes as if they had been abiding and born within this our realm of England."

But the efficacy of these provisions remained subject to a further provision that the King's instructions should prevail in all questions of government. The instructions³ seem to relate to matters of detail, the proper conduct of which could hardly be anticipated by a man, King though he was, who had, necessarily, the vaguest knowledge of conditions that might exist in the forests on the Powhatan, and who was wholly without experience in adventures in strange lands among tribes of savage men.

But the council oligarchy lasted only two years. In 1609 there was an amendment of the charter in the very important matter of providing for the appointment by the company of a governor, who was to take the place of this council, and to have almost absolute

¹Cooke's History of Virginia, 15. Howe's History and Antiquities of Virginia, 23. Justice in Colonial Virginia, 10.

²Justice in Colonial Virginia, 11.

³English Colonies in America.

power.¹ Justice to the individual now depended upon such laws as the governor might promulgate, and upon both his sense, and sense of justice, in administering them. These governors varied much according to their dispositions and capacities, and rights of property and even rights of life and liberty, varied in the same degrees. Possibly a community like that, composed of a miscellaneous lot of people emptied out of the ships into the wilderness, needed an autocrat to save the state in the perils of its infancy, but it is a tribute both to the improvement in the people themselves and to the appreciative judgment of the company as to what was naturally to be considered best for a colony of Englishmen, that in ten years this despotic form of government was abolished, and a large part of government put in the hands of the people, in that they were granted the right to meet, through their chosen representatives, in the first legislative body that ever assembled in America.

For this new charter the colonists were indebted more to Sir Edwin Sandys, a tolerant and liberal member of the English Parliament, than to any other source. Governor Yeardley was instructed to issue writs for the election of a General Assembly in Virginia. The elections were held in the same primitive and informal ways that have, indeed, characterized the beginnings of all free governments, and the General Assembly met on July 30, 1619, in the little wooden church at Jamestown.

The occasion was a far more momentous one than the participants realized; the surroundings, though simple, were dignified and impressive, the actors were earnest minded men, happy in the thought of

¹Hening. Vol. I. Justice in Colonial Virginia, 12. Genesis of the United States. Brown. 208, 233-234, 375-380.

the improved conditions in the character of their government, but they had no thought of posing as if all the centuries yet to come would be gazing upon them.

The governor and members of the council created with him sat in the choir, the governor in the centre and the members on either side of him. The twenty burgesses of the twenty-two¹ elected for eleven boroughs sat also in the choir, with their hats on, but after the prayer was said and the oath of supremacy taken, the burgesses took their seats in the body of the church fronting the governor and council. Thus, instinctively, the party of men in that little wooden church in the little village on the banks of the river, set the form for future parliamentary bodies in America, of two houses, the governor and council being the senate, and the elected burgesses the direct representatives of the people; although, in point of fact, until 1680 they sat together and voted together as one house.

But the likeness of this assembly to its successors under the Constitution of the United States and of those of the several states does not extend far. The latter are purely legislative bodies, while that which held its first session at Jamestown combined, in almost equal degrees, legislative, judicial and executive functions.

The General Assembly was thus composed of the governor and council — called the council, — as one body, and the House of Burgesses as the other, but sitting as one house until 1680, had full power of legislation for the colony, although its acts did not acquire validity until approved by the General Court of the London Company, but, on the other hand, no enactment of the Company for the colony was valid until approved by the General Assembly.²

¹Two were excluded. See *ante* page 34

²English Colonies in America, 9.

The right to representative government was further assured by still another charter granted on July 24, 1621.¹ By this all the powers granted by the charter of 1619 were confirmed,² but it was further provided that the governor should call together the General Assembly once a year and not oftener, unless on very extraordinary and important occasions.³

To the governor was given the right to veto any bill of the General Assembly, but the Assembly was to have "full power to treat, consult and conclude, as well of all emergent occasions concerning the public weal of the said colony, and every part thereof, as also to make, ordain and enact such general laws for the behoof of said colony and the good government thereof as from time to time might seem necessary."⁴

Further it was directed that the General Assembly and Council of State must imitate and follow the policy of the form of government, laws, customs and manner of trial, and of the administration of justice used in the realm of England, as near as might be, as the Company itself was required to do by its charter. No law or ordinance was to continue in force or validity unless it was solemnly ratified by a general quarterly court of the Company, and returned under seal; and it was directed that as soon as the government of the colony should once have been well framed and settled, that no orders of court should afterwards bind the colony unless they were ratified in the same manner by the General Assembly.⁵

The session of the General Assembly held July 30, 1619, beyond praying the London Company that the

¹Old Virginia and Her Neighbors. Vol. I, 187. Howe's History and Antiquities of Virginia, 42. Vols. VII, VIII. Virginia Historical Collections.

²Old Virginia and Her Neighbors. Vol. I, 187.

³See the end of this chapter.

⁴Howe's History and Antiquities of Virginia, 43.

⁵*Id.*

clause in its charter guaranteeing equal laws might not be violated,¹ adopted no measures of any moment. What they did enact was in the way of matters of general utility, sumptuary laws, and more particularly police regulations. The Assembly provided for the control of the clergy and laid a tax on tobacco for their support.

The early conception of its powers by the General Assembly is an important factor in a proper understanding of the government of the colony at this stage of its existence.

The council, or appointed branch of the General Assembly, was more especially a court, sitting as such wholly independent of the burgesses. It followed naturally, therefore, that when judicial questions were brought before the General Assembly they were inclined to and generally did refer them to the council; but the General Assembly did not by any means abrogate its judicial functions. As late as 1662 the first day of every session was set apart for hearing indictments made by grand juries, and for inquiry into the methods employed by the courts and abuses practised by judges and juries,² and on several occasions the Assembly quite pointedly denied the power of any court to controvert any of its acts.³

Its judicial jurisdiction was, for a time at least, both original and appellate, civil and criminal, and during this time its original jurisdiction seems to have been concurrent with that of the Quarter Court. But as early as 1641 its civil jurisdiction was limited to appellate cases, and at times it took to itself a sort of *certiorari* jurisdiction, by providing that there was

¹English Colonies in America, 9.

²Justice in Colonial Virginia, 20.

³Justice in Colonial Virginia, 20. Hening, Statutes at Large. Vol. II, 108. Vol. I, 264, 447.

to be admitted to the Assembly for trial, any cause that had had a hearing in any court, provided an act of injustice had been committed by the award of the lower tribunal,¹ nor but for a time was any minimum sum fixed as the limit to the jurisdiction of the Assembly.²

The trial of cases was not before the whole Assembly, but they were conducted through committees, whose findings were not binding until confirmed by the Assembly in session. The Assembly could and did impose penalties for crimes by fines and the lash. It had also the power, seldom exercised, of passing acts of attainder and the right, often exercised, of docking entails, and granting permission to alienate entailed estates.³

While after its appellate jurisdiction was taken away from the General Assembly, the General Court became the highest judicial authority in the colony, the action on appeals by the General Assembly had never been that of a court of last resort. The right of appeal to England always existed, and the Company in London could set aside a decision given in Virginia, if it considered it unjust, or that it had not been rendered in accordance with their general instructions. After 1624,⁴ when the charter of the Company was annulled, appeals to England were made to the King and the Privy Council.

All of these valued concessions to free, regular and reputable government came from the London Company, which stood for fair dealing and home rule between the

¹Justice in Colonial Virginia, 22, and a number of authorities there cited.

²*Id.* The council ceased to sit with the burgesses in June, 1680, and occupied a separate building. When the capitol was built at Williamsburg the council occupied a room in the same building, but separate from the assembly, and thenceforth sat as the Upper House. The Legislature of the Province of Virginia. Miller 40-173.

³Justice in Colonial Virginia, 26.

⁴*Id.*, 29.

colony and the King. But this mere interposition, to say nothing of the necessity for it, appeared to discriminate between Englishmen on England's soil and those who had gone out to found colonies for the mother kingdom. The complete equality, therefore, of the colonists in the right to the enjoyment of the liberties of England, seemed to make it necessary that the London Company should be dispensed with, and that the colony should thereafter stand as a part of the realm of England, without the aid of such artificial support. This was the not unnatural way of looking at the matter from the viewpoint of the more liberal and advanced statesmen of England, who were especially friendly to the colony. At the time, however, it was by no means the wish of the colonists, for the good things that had come to them had come through the Company, while the evil had been chiefly of the King's making. The end of the Company came, however, from several influences, but more immediately from James' jealousy of the freedom of discussion in the meetings of the council of the London Company, as if there was to be yet another Parliament in England for the control of colonial affairs. Down in his heart James would have liked to dispense with both Parliament and Company. But exactly the opposite influence was at the same time working to the same end — the end of the Company, — for that was the quickest way by which Parliament could show its resentment at the King's usurpation in attempting to control the election of the members of the council of the Company. Factions in the Company itself hastened its downfall, and finally, in October, 1623, about seventeen years after it came into existence, its charter was revoked by an act of the Privy Council, and its delegated powers of sovereignty were resumed by the King.

The Company did not suffer extinction without protest. It tried its remedy of *quo warranto* in the King's Bench, but for very curious and *complaisant* reasons the court confirmed the action of the Privy Council and pronounced the charter null and void.¹

On the 26th day of June, 1624, the Privy Council ordered the Rev. Nicholas Ferrar, one of the committee who had prepared the able defense of the Company to the accusations brought against it by the King, to bring all the books and papers of the Company and hand them over to its custody. Fiske² tells interestingly the story of how Ferrar, not daring to disobey the order, but willing to come as near doing so as was consistent with safety, had copies made of all the Company's proceedings from April, 1619, to June 7, 1624, before he gave up the original books and papers. He tells of how this copy was for forty-three years preserved by the son and successor of the Earl of Southampton, who, with Ferrar, had taken such an active part in the Company's affairs; and of how this manuscript was bought from the executors of Southampton by William Byrd of Virginia. From the Byrd library it went to Rev. William Stith, the historian and president of William and Mary College. Then it passed to Peyton Randolph, a kinsman of Stith, and was afterwards bought by Thomas Jefferson. In 1814, Mr. Jefferson sold his library, including this manuscript, to the United States, and there it is now in the Library of Congress, seven hundred and forty-one folio pages, bound in two volumes.

To complete the story, and the connection between this courageous patriotism of Ferrar and the two prosaic looking volumes which lie upon my desk while

¹Old Virginia and Her Neighbors. Vol. I, 201-222.

²*Id.*, 220, 223.

I write, it is enough to say that abstracts of this manuscript were made by the scholar and lawyer, Conway Robinson, about the year 1856. These were presented by Mr. Robinson's widow to the Virginia Historical Society and printed by its order, in 1887, as volumes VII and VIII of its proceedings. To this publication was added, by Dr. R. A. Brock, the secretary of the society, an introduction so full of valuable and interesting matter that as a bibliography of the early history of Virginia it is hardly possible that any other publication can be compared with it.

The King, satisfied apparently with his triumph in the null and void order business, and the *quo warranto* confirmation by his complaisant judges, and feeling that just that much more of power had been accumulated in the royal breast, did not take a mean advantage of his victory, but proceeded to appoint a good governor and moderate men to manage in his name the affairs of Virginia in the place of the defunct Company. So, in spite of the fears of the people, the fall of the Company did the colony no harm. What might have happened later, had James lived, it is hard to predict, but in March, 1625, while the King was engaged in composing, with his own hand, a new code of laws for Virginia, death came to him and ended that chapter.¹

Then came Charles, and after Charles came the Commonwealth and Lord High Protector Cromwell, and then another Charles, during which time were some changes of government, or rather of governing, worthy of note.

The first Charles did not long wait to let the Virginians know that he had them in mind. The ship that brought the tidings of the death of James brought also a communication from the new King, dated May

¹Cooke's History of Virginia, 133.

13, 1625,¹ in which he expressed his desire "that their maie be one uniforme course of government in and through our whole monarchie;" that the government for the colony should "ymediately depend upon ourselfe and not be committed to anie companie;" that until he should further declare his pleasure he would have commissioners to manage things from England as he should direct, but that, as soon as possible, he would establish a "Counsell consistinge of a few persons of understanding and qualitie," to whom he would give the immediate care of the colony, but answerable immediately to him. He kept this promise to Virginia and sent a good governor — Yeardley — who had served acceptably before, and appointed, also, good men as resident councilors, principally those holding the power when his father died.² He also confirmed representative government in the colony, which it is likely James would have undone,³ addressing a message straight to "Our trusty and well-beloved Burgesses of the Grand Assembly of Virginia."

Other governors came, some good and some bad, but none so good as Yeardley. But the colony prospered, and save the serious trouble of the Bacon Rebellion while Berkeley was governor, the course of government ran smooth, in the main.

The Virginia people were profoundly loyal to Charles, possibly because they did not suffer directly from the royal encroachments which raised so large a party against him in England, so they were greatly shocked at his death and looked upon Cromwell as a regicide and usurper. But their first determination to resist

¹Virginia Carolorum, 10.

²Old Virginia and Her Neighbors. Vol. I, 242. Virginia Carolorum, 38.

³Old Virginia and Her Neighbors. Vol. I, 237.

the new government gave way to more prudent counsel, theirs surely being a case where the discretion of submission was the better part of valor. So they received Cromwell's commissioners, made a fair bargain with them as to taxes, trade, etc., reserving the right, privately, to toast the King¹ and curse the Protector, and accepted the new conditions, simply because they could not help themselves. Sir William Berkeley, the governor, resigned, sold his brick house in Jamestown, and went to live at Green Spring, his fine place in the country near the town.

During Cromwell's time the House of Burgesses elected the governors, three of them,² and also the councilors, which was great compensation to the people for not having a King. But it was rather a strange condition of parliamentary government, that the lower house³ should choose the upper, which included the governor with his veto check. So it was, that the burgesses were the whole government, and thus lacked the balancing so important to a representative system. But it worked all right for the time, and when Oliver died, and Richard Cromwell, proving inadequate, subsided, the King came to his own again; and his restoration restored also the old conditions in Virginia, which were very willing to be restored. So it came about that Kings went on appointing governors and councilors and other officials on the recommendation of the governors, until the taxation without representation scheme was put in force, and the stamp act and the duty on glass, paint colors, paper and tea, were imposed, and the tea got thrown into Boston harbor, when the colonists seceded, made states of themselves,

¹Old Virginia and Her Neighbors. Vol. I, 314.

²English Colonies in America, 17.

³Not then yet established as such.

and took in hand on their own account the governor business.

During the first half of the eighteenth century, with which we are principally concerned, Francis Nicholson, Edward Nott, Alexander Spotswood — he of the Golden Horseshoe — Hugh Drysdale, William Gooch, and Robert Dinwiddie, were the governors. Of these all but two were lieutenant or deputy governors, the governor being a sinecure appointee, who drew the salary and called himself governor. This was a grievance to the colonists all the time, but as many of the deputies were good men — better perhaps than their sinecure principals — no particular point was made of it until the tea and stamp tax business made all grievances grow. Indeed, so popular were these deputy governors that counties were named after many of them, after Spotswood, Gooch and Dinwiddie of those I have named, and after Fauquier, Loudoun, Botetourt and others, and the names still remain. Even Dunmore, who came at an unlucky time and carried away the powder from Williamsburg, and soon after had to have himself likewise carried away in a ship from the wrath of the rebels, whom we now call revolutionists, had a county named after him. But that was more than the burgesses could agree to let stand, so in October, 1777, one of the delegates from Dunmore county stated¹ "that his constituents no longer wished to live in, or he to represent, a county bearing the name of such a tory; he therefore moved to call it Shenandoah, after the beautiful stream which passes through it," and it was done on the spot, being also an improvement in an esthetic sense, or sound.

But before all this came to pass, and when the British

¹Howe's History of Virginia and its Antiquities, 467.

government was disposed to make up with the colonists and satisfy any grievance, provided only it retained the right to tax tea or some other little thing, it was in order to do away with the deputy governor habit and send out to Virginia the real thing. So King George III sent a man of rank, a very gracious and attractive gentleman, the Baron de Botetourt, who took his first occasion to announce¹ that it was his majesty's gracious intention "that, for the future, his chief governors of Virginia shall reside within the government."

But acceptable as this was, it did not help the other trouble, and some few millions of subjects of the King, the greater number of whom probably did not drink tea, renounced their allegiance to King George and fought England for seven years, because the tempest which that teapot made was the tax on the tea put in the pot without consulting the drinker, and therefore a giving of tribute, which surely was against the liberties of England assured to all the King's subjects in Virginia by the charter of 1606, and also by the inherent nature of those born or bred from English stock.

And besides the burgesses and the Governor and council sitting as an upper house, there was also the council of which the Governor was a part, and which also sat separately, with both judicial and legislative, and, indeed, executive functions; but as it came to be called first the *Quarter Court* and then the *General Court*, a full discussion of it belongs to the part of this introduction devoted to the courts. But a few words must be said here about the *Monthly Court*, afterwards called the *County Court*.

As early as 1623, *Monthly Courts* were established

¹Williamsburg. Tyler, 46.

for Charles City and Elizabeth City, although as early as 1619, in the British State Papers, Colonial, Vol. III, No. 21, 1, it is said that "Monthly Courts were held in every precinct to doe justice in redressing of all small and petty matters, others of more consequence being referred to the Governor Counsell and Generall Assemblie."¹ But before this there had been a court held at Jamestown to which all cases had been brought for trial.² These courts were called by the act establishing them, "Monthly Courts for decyding of suits and controversies, not exceeding the value one hundred pounds of tobacco and for punishing of petty offences." They were held by the commanders of plantations and such others as the Governor and his Privy Council might appoint and commission, with the right of appeal from their decisions to the Governor and council, with this discouraging provision against appeals, that "whoever shall appeal shall be required to pay double costs if he fail in his suit."³ Up to 1633 the political divisions of the colony were called hundreds and plantations. In 1634 these, then eight in number, were enacted into eight shires, "to be governed as the shires in England." In 1643 these shires and five others were formed into counties, and thenceforth they, and others subsequently formed, were called counties.⁴

In 1629, commissioners of Monthly Courts were substituted for commanders of plantations as judges, the Governor and Privy Council being authorized to act as commissioners of the Monthly Court at Jamestown, in connection with the regular commissioners. In 1642, the name of these tribunals was changed

¹Economic History of Virginia. Bruce. Vol. I, 571.

²Works of Capt. John Smith.

³Judge Waller R. Staples. Vol. VII. Rep of Va. State Bar Ass'n.

⁴Cooke's History of Virginia, 202

from Monthly Courts to County Courts, which latter name they retained until the court was abolished.

Up to 1661-2, Justices of the Peace were not known as such in Virginia, but in that year an act was passed requiring commissioners of County Courts to take the oaths of Justices of the Peace, and to be so designated in all judicial proceedings.

Commanders, however, had many of the duties of Justices of the Peace and to some extent those of Grand Juries. They were members of the vestry of the parish and at different times were chosen in different ways, sometimes elected by the people, sometimes by the commissioners of the Monthly Court, and sometimes were self-perpetuating bodies like the County Courts.¹

While the duties of the County Courts were mainly judicial, the courts were also the fiscal managers of the counties and legislated locally to a considerable extent. It is because they were, for the greater part of the existence of the system, perhaps the most important part of the government of the colony and of the state that they are mentioned here. Up to the Constitution of 1850, when the self-perpetuating feature of this organization was taken away, the County Courts were both the most effective and popular of governmental agencies. Even after that, their usefulness, although impaired, remained in great degree, and their popularity was undiminished. In 1869, by a convention, nominally but not really chosen by Virginians, under military order and universal negro and other kinds of suffrage, judges to the number of a hundred or more, "learned in the law," were substituted for the justices who were not required to be so learned. This ended the popular and representative character of the court, and, being so ended, it was finally abolished, without

¹Justice in Colonial Virginia, 83.

a sigh, by the convention of 1901-02. But of this tribunal, as a court, we will have more to say in another chapter.

The regulations and provisions as to the number of burgesses to represent any particular constituency, and the qualifications and disqualifications of persons for holding the office, and of those who were to vote for them, changed very much from time to time. To record these in this writing would be beyond its scope and purpose. They are set out in the various histories of the colony times, but I know no history in which they are as well declared, and where the authorities to support the statements of them are better collected, than in a paper-bound book of 176 pages to be found in the library of the Virginia Historical Society at Richmond, written by Elmer J. Miller, Ph.D., Chico, Cal., and published by the Columbia University Press, 1907.

The same book discusses very fully the relations of the appointed councilors to the elected burgesses; the right of William and Mary College to representation in the General Assembly; the changing times for the sessions of the Assembly; the grievances against the Governor for failing to call the Assembly together; the times and manner of holding the elections; the privileges and pay of members; the duties and pay of councilors; the rules governing the procedure of the General Assembly; the Governor's privileges and powers; the appointment and dismissal of councilors; the public officers of the colony and the manner of choosing them; the relations, and relative rank in importance, of the councilors and the burgesses after they sat separately, and before; and the general prerogatives of the Governor. While all these are matters of deep interest and importance, and are essential

to a complete understanding of the government of the colony, as already stated, they are beyond the scope of this writing, and are therefore simply referred to so as to make the sources of information readily accessible to the reader who desires to seek further.

CHAPTER V

THE CHURCH

The story of the religion, churches and church buildings of any people tells, necessarily, very much of their habits, manners, and customs, and this is especially true of a new settlement which had grown up in the woods. Just enough of this to serve that purpose will be told here of the colony on the James.

The Charter of 1606 "professed, as a leading preamble or motive, 'the furtherance of so noble a work' as the planting of Christianity amongst heathens,"¹ and "the last advice given the colonists by the King's Council for Virginia was, — 'Lastly and chiefly the way to achieve good success is to make yourselves all of one mind for the good of your country and your own, and to serve and fear God, the giver of all goodness; for every plantation which our Heavenly Father hath not planted shall be rooted out.'"²

But the religion that was to be preached to the Indians and observed in the colony, was to be only in accordance with the forms and doctrines of the Church of England. Not a few of those who came over in the three little ships, or who came in the supplies that followed after from time to time, were hardly up to the standard one would set for a missionary, though Parson Hunt, who was of the first adventurers, proved himself "an honest, religious and courageous divine,"³ and Mr. Bucke and Mr. Wickham, and the "Apostle of Virginia," Mr. Whitaker, who also came in the early years, were unselfish, pious men of irreproachable life.

¹The First Republic in America. Brown, 6.

²*Id.*, 31.

³Cooke's History of Virginia, 333.

Captain John Smith's account of the first place for worship, indicates that quite as much zeal in religious matters was shown as had been expected of these adventurers; the awning¹ made of an old sail hung to three or four trees;² the seats from unhewed trees; the bar of wood between two of them for a pulpit; later the old rotten tent; and then later still "a homely thing like a barn, set upon crotchets, covered with rafts, sedge and earth," and "yet we had daily common prayer, morning and evening, every Sunday two sermons, and every three months the holy communion, till our minister (the Rev. Mr. Hunt) died; but our prayers daily, with an homily on Sundays, we continued two or three years after, till more preachers came," all make a graphic picture of the first religious exercises in the wilderness.

The poor little "homely thing like a barn" was burned within two years. Then there were rebuildings and repairs, and we are told of a chapel, sixty feet by twenty-four, "with a chancel of cedar and a communion table of black walnut; all the pews and the pulpit were of cedar with fair broad windows, also of cedar, to shut and open as the weather shall occasion."³

This was a timber building, the beautifying of which was the work of Lord Delaware, who came on that fateful Sunday, June 10, 1610. And besides all these things, he provided a font "hewen hollow like a canoa," and there were two bells in the steeple at the west end, and a sexton to ring the bells about ten o'clock every morning and at four in the afternoon before supper, and it was "kept passing sweet and trimmed up with divers flowers."

¹The Cradle of the Republic, 73.

²So well represented on the same ground, and to trees probably just like those of 1607, at the great meeting held there just three hundred years later.

³First Republic in America. Brown, 129

It was probably in the wooden church (known as the Argall Church, and which succeeded this little building) that the first legislature sat in 1619,¹ and it is supposed that it continued to be used until the brick church, commenced in 1639, was completed, and which was burned down by Bacon in 1676. Then the brick church was repaired again, and used even after Jamestown was practically abandoned and until about 1758,² and then allowed to fall into decay until nothing remained of it but the tower, still standing, and now piously preserved from further destruction.

Although this tower was built sometime between 1639 and 1647, it is claimed that it is not the oldest church building in Virginia still standing. That near Smithfield in Isle of Wight County, it is supposed was erected in 1632, and is still there in good condition,³ having been restored in recent years.

In Henrico, one of the eight original shires established in 1634, as early as 1611 a town named Henricopolis was built by Sir Thomas Dale, "with a good church."⁴ Not far away, in the angle between the James River and the Appomattox, another town, called Bermuda Hundred, was built also, and there too was a church. It was of these two churches that the Rev. Alexander Whitaker had charge until 1617, when he was drowned.

And so it was through all the colonial time, as the settlements advanced along the rivers and then back into the country, and at last over the mountains, wherever they built a little town, and in many places where no town was, they built a church. And the church was the centre of the social as well as of the

¹Cradle of the Republic, 76. Bruton Parish Church Restored. Goodwin, 38.

²*Id.*

³Address of R. S. Thomas, 1891. Virginia Historical Collections, Vol. XI, 129.

⁴Howe's History and Antiquities of Virginia, 302.

religious life, and in many respects was the dispenser of education, or at least of civilization. The Sunday gatherings of the people at the little churches from all the country side, nearly all of whom were related by blood or marriage, the cordial greetings and inquiries about each other's affairs and kindly interest manifested in the well doing of those absent or present, were, in that simple life, almost the coming together of family groups. Over the bad roads they came, often on horseback¹ with pillions behind the saddles, on which the ladies rode; or the young women, mounted on their own fine and well managed steeds, were a quickly accepted challenge to the equally well mounted young men of the neighborhood, and no blue law, of which there were many, prevented an occasional dash along the sandy roads by the woods, as a concession to the eagerness of their mettlesome horses. Or, when the season and the road permitted, as in some sections they did even in the winter, the older people came in their carriages slung wide between the axles, with a pair, at least, of horses, and a negro driver mounted upon his high seat in front; often a footman too, much more for use in the very possible emergency of a breakdown, than he ever could be for ornament.

In the country churches, and they were all country churches, the benediction pronounced — the aisle buzzed with the interchange of neighborly greetings, the men gathered on the grass outside, and generally there were invitations, frequently accepted, to go by and take a Sunday dinner. It was a simple, sweet and happy life into which the word "strenuous" had

¹" They stay also after the service is over, usually as long, sometimes longer, than the Parson was preaching. . . . Almost every Lady wears a red Cloak: and when they ride out they tye a red handkerchief over their Head and face, so that when I first came into Virginia, I was distressed whenever I saw a Lady, for I thought she had the Tooth-ach." Fithian, 58.

never entered, and indeed for which there was no place.

Philip Vickers Fithian of Greenwich, New Jersey, was a student at Princeton College, 1770-72, and taught in 1773-74 in the family of Councilor Robert Carter of Normini Hall, in Westmoreland County, Virginia. He kept a diary, and for it he deserves to be ranked among the makers of history for the many delightful and evidently truthful pictures given of a time and a people about which there will only be an increase of interest as the years divide us from them. Fithian was a Presbyterian and a divinity student, to whom the customs of the light-hearted Virginians did not at first readily adjust themselves. Naturally his Sunday sketches are rather commonplace, but being cotemporaneous are valuable. In one he says, "After having paid my morning secret Devotion to the King of Kings, I sat myself to the correcting and transcribing my sermon. — I had the pleasure to wait on Mrs. Carter to Church. She rode in the chariot & Miss Prissy and Nancy; Mr. Carter chose to stay at Home. The sacrament was to have been administered, but there was so few people that he thought it improper, and put of til Sunday fortnight. He preached from Isaiah 9.6, 'For unto us a child is Born etc.,' his sermon was fifteen Minutes long. Very fashionable — He invited me very civilly to Dine and Spend the evening but I could not leave the Ladies. He made me almost promise, however, to call some Day this weak."

On another Sunday "I rose at eight — The morning cold and stormy. Ben¹ is distressed that he can not go to Church: I can not say but I enjoy myself with great satisfaction tho I stay most of my time in my

¹Ben Carter, one of his pupils.

Chamber & often have to withstand the solicitations of Gentlemen to visit them.

"Breakfasted at half after nine. Mr. Lane the other Day informed me that the Anabaptists in Loudon County are growing very numerous & seem to be increasing in affluence; and as he thinks quite destroying pleasure in the Country; for they encourage ardent Pray'r; strong & constant faith & an intire Banishment of Gaming, Dancing & Sabbath Day Diversions."

A part only of one more Sunday diary must suffice: "The Day pleasant. I rode to Church. After the service proper for the Day, Mr. Smith entertained us with a sermon from Pauls discourse before King Agrippa 'How is it thought a thing impossible with you that God should raise the dead.' He in this gave us a very plain & Just Discourse on the doctrine of the resurrection. This being Easter Sunday, all the Parish seem'd to meet together, High, Low, black, White all come out — After Sermon the Sacrament was administered, but none are admitted except communicants to see how the matter is conducted. After Sermon I rode to Mr. Turberville's (for I found today the true spelling of his name). Then dined with him; Ladies Mrs. Carter & Mrs. George Turberville; Gentlemen, Colonel Carter, Squire Lee, Mr. Cunningham & Mr. Jennings; Merchants, Mr. George Lee & Ben Carter & Myself. We had an elegant dinner Beef & Greens; roast Pig; fine boil'd Rock-Fish, Pudding, Chees etc.— Drink; good Porter, Beer, Cyder, Rum & Brandy Toddy. The Virginians are so kind one can scarce know how to dispense with, or indeed accept their kindness shown in such a variety of instances." But after a while he pays a visit home and makes this entry of his first Sunday there. "I went to meeting, How unlike Virginia, no ring of Beaux chatting before

& after Sermons on Gallantry; no assembling in crowds after service to dine and bargain; no cool, spiritless harangue from the Pulpit; Minister & People here seem in some small measure to reverence the Day, there neither do the one or the other."

We catch glimpses in the diary, of Mr. Thomas Smith, rector of the Parish, and a few other ministers named, devout and pious men, though not quite up to the standard set by Mr. Fithian. But, especially in the earlier times, there were too few shepherds for the increasing number of sheep, and we find a "scarcity of pastors" much complained of. Some even of them it was said "did give themselves to excess in drinking, or riot, playing at dice, cards, or any unlawful game but at all times convenient; here or read somewhat of the Holy Scriptures, always doing the things which appertain to honesty."¹ And of a later period it is related² of some of them that "they played cards and hunted the fox, and indulged in drink; and what was even worse, they had small love for their neighbors the Dissenters. It is true the Dissenters cordially returned this dislike and were quite as rancorous, but that was nothing to the purpose. The Church of England Clergyman denounced the New Light Preacher as a disturber, and the New Light Preacher denounced the Clergyman as a disgrace to his cloth."

Something of this was due, as was claimed, to the character of the imported minister, who, from lack of piety or sense, or both, unable to secure employment at home, had at first come to the ministry, and then to the colony. Something perhaps too was the reflex from the congregations to whom they ministered, who

¹Cooke's History of Virginia, 169.

²*Id.*, 332. Old Churches, Ministers, etc., of Virginia. Bishop Meade. Vol. II. 351.

as a rule were not all given to very serious and heavenly minded modes of thought or life. But there was no lack of laws to regulate these matters of religion, for, as in both Old England and New, *law* was thought to be a cure for sin, and there were penalties for failing to attend service, for work, sport or travel on Sunday; and for swearing and drunkenness the pillory was the appointed punishment.¹ These paternalistic laws show best, however, what were the besetting infirmities because of which they were enacted.

Partly on account of the lax religious character of some of the ministers and members of the Church, although those so open to criticism were really a small minority,² or perhaps because it was forbidden both by law and by a strong public opinion, dissent, commencing with a vain attempt as early as 1643, when Sir William Berkeley stamped out the first importation of puritanism with Act of Assembly,³ and bigoted persecution, got, after a while, a footing in the land and increased until presently the old order was itself much the smaller part.

Dissent from the established Church was spreading in England. It was natural that it should spread faster in the freer air of Virginia. Intolerant and discriminating laws, exiling of missionaries, social ostracism and denunciation, have always been the food to fatten the cause they persecute.

About the beginning of the eighteenth century, this spirit was flagrant in Great Britain and, especially, in Ireland. It had been the Presbyterians of Scotland who, coming to Ulster early in the seventeenth century, gave to the north of Ireland a Protestant population

¹Report of Virginia State Bar Association. Vol. VI. 167.

²*Post.*

³Hening, Statutes at Large. Vol. I, 277.

in excess of the Catholics and made them the controlling element of that part of the country.¹ Scotch thrift made a garden out of a wilderness of bogs, and established factories and other industries so successfully, that the north of Ireland has to this day, by contrast with the rest of that interesting but poverty afflicted land, seemed like a different state. These were the people who, coming to America, were called here the Scotch-Irish, and who have been mentioned as affecting so materially, for its good, the settlement of the Shenandoah Valley of Virginia.

Now, a hundred years after their settlement in Ireland, they were being subjected there to severe political discriminations. "They were forbidden to keep schools, marriages performed by their clergy were declared invalid, they were not allowed to hold any office higher than that of petty constable, and so on through a long list of silly and outrageous enactments."² The consequence was a great emigration to America, which, beginning early in the century, continued until the passage of the Toleration Act of Ireland, in 1782. Mr. Fiske³ puts the emigration, between 1730 and 1770, at at least half a million souls, making about one-sixth part⁴ of the population of the colonies at the time of the Revolution. Most of them came to Philadelphia and spread through Pennsylvania, and from there through the Shenandoah Valley of Virginia, and into the Carolinas and west of the Alleghanies to the Ohio river.

The Pennsylvanians did not like the Scotch-Irish, regarding them as a "pugnacious" people and undesirable neighbors. The Secretary of the province

¹Old Virginia and Her Neighbors. Vol. II, 391.

²*Id.*, 393.

³*Id.*, 394.

⁴About two-thirds of the population of Virginia.

wrote of them when they began to come in such numbers, that "The common fear is that if they thus continue to come, they will make themselves proprietors of the Province. It is strange that they thus crowd where they are not wanted."¹ This want of welcome speeded their departure for the south, and it was the Virginians who later realized the anticipation that had disturbed the Pennsylvanians.

The list of the names of Virginia families descended from these people is a distinguished one and includes among them that of Stonewall Jackson,² whom Virginians are proud to recognize as a typical product of that fine class of her population, as they also do General R. E. Lee as a type of the best element of that older colonial stock, which, swearing by the Church and King, yet were among the first in the fight for American independence. It was not to be wondered that such a people as these Scotch-Irish, having the power, refused to tolerate in America even the name of discrimination, which they had left their prosperous Irish homes to escape.

Persecutions of them in the colony had taken the aggravating form of humiliating restrictions upon the right to worship after their own method; requiring from them licenses and oaths not to teach heresy, and as to their behavior towards the government; disturbances of their meetings; debarring them from sitting as members of the legislature, owning church buildings, or graveyards; requiring them to read the book of Common Prayer in their services; to have their churches outside of the towns; and other equally intolerable and exasperating exactions.³ To them

¹The Planting of Presbyterianism. Rev. J. R. Graham, D.D., 13.

²Old Virginia and Her Neighbors. Vol. II, 395.

The Planting of Presbyterianism, 127.

too the English Parish law, transported to Virginia and giving to the Vestry, at first elected by the people and then made a close corporation, all control over local government, parish taxes, the processioning of the bounds of any person's land, control over land titles, etc., etc., were very like the discriminating laws which had driven them out of Ireland and not to be borne longer than they could help it.¹

But the provocation was far from being on one side, and the brave and gentle old bishop, who has in such an interesting way recorded the events and weighed carefully the grievances of each side of these humanly natural but unfortunate controversies, shows that the aggravations were not near so one-sided as some zealous writers have contended.²

It was at first the *vis inertiae*, and then the active and aggressive opposition of these people, which would in a little time, even without the Revolution, have produced the same results that with the Revolution, under the leadership of Thomas Jefferson, secured the complete separation of Church and State, entire religious toleration so far as the law can ever produce that, and the abolition of primogeniture and entails.³

The date given⁴ for the earliest settlements of the Scotch-Irish and German Presbyterians in the lower (northern) end of the Valley is 1732 to 1735, but as early as 1720 there is record of putting "the people into Church order" at "Potomoke" in Virginia.⁵

In 1775-1776, Rev. Philip Vickers Fithian, then a regularly constituted Presbyterian minister, preached quite effectively to the Valley people, and, as when

¹Old Virginia and Her Neighbors. Vol. II, 98.

²Old Churches, Ministers, etc. Vol. I, 436.

³Old Virginia and Her Neighbors. Vol. II, 396.

⁴The Planting of Presbyterianism, 6.

⁵*Id.*, 7.

at Normini Hall the preceding two years, kept a diary full of interesting incidents. He found the war spirit flagrant in the Valley, and at Winchester, June 6, 1776, he writes: "But here every presence is warlike—every sound is martial—drumms beating, pipes and bagpipes playing only sonorous and venic music. Every man has a hunting shirt, which is the uniform of each company. Almost all have a cockade and buck-tail in their hats to represent that they are hardy, resolute and invincible natives of the woods of America."¹

On July 12, 1776, he himself enlisted as chaplain in a New Jersey brigade, and after serving under Washington in two battles, was taken sick and died October 8, 1776.²

But the Scotch-Irish Presbyterians did not confine themselves to the part of Virginia west of the Blue Ridge, for many of them went to Hanover, Charlotte and Prince Edward counties and there, as in the western part of the state, became the most influential element of the population.

Whatever of unfair discrimination still remained in the letter of the law, between the educated portions, at least, of two such populations as the older Church of England colonists and the new Scotch-Irish immigrants, there could not long have remained a very serious antagonism. Social intercourse and inter-marriage, and, afterwards, the common perils of the

¹The Planting of Presbyterianism, 49.

²Fithian's Journal and Letters. Introduction. XIII.

Fithian came to Virginia full of prejudices implanted in him by his religious friends in New Jersey. He says they besought him not to go because "the people are exceedingly wicked. . . . That I shall read no Calvinistic Books nor hear any Presbyterian Sermons."

He came, however, and this is what he writes in his Journal after spending some time in Virginia: "The people are extremely hospitable and very polite, both of which are now certainly universal Characteristics of the Gentlemen of Virginia—Some swear bitterly, but the practice seems to be generally disapproved. I have heard that this Country is notorious for gaming, however that be I have not seen a Pack of Cards nor a Die since I left home, nor gaming or Betting of any kind except at the Richmond race." Fithian's Journal, pages 51, 58.

revolution, doubtless had this fine effect at last; and, indeed, a growing tolerance for differences of opinion, political and religious, before many years smoothed the sharp edge of dissension, and I doubt not that even as early as 1773 the opinion of Mrs. Col. Carter, as expressed by our friend Mr. Fithian in his diary, was that of most people of her class. He writes there this record of a wet Sunday talk with her: "None thinks of going to Church this day — Mrs. Carter and I after Breakfast had a long conversation on religious affairs — Particularly on differing Denominations of Protestants — She thinks the Religion of the established Church without exception the best of any invented or practised in the world & indeed she converses with great propriety on these things & discovers her very extensive knowledge. She allows the Difference between this Church & Presbyterians to be only exceeding small & wishes they were both intirely United."

But this was not so at an earlier time, and it was then far from being universal, nor ever was, nor will it ever so be; and then the heat of the immediately pre-revolutionary times begot intolerance and bitterness far more intense than had for many years been exhibited by the Church of England people against the dissenters.

While the Presbyterians were far the largest and most influential body of those who differed from the established Church, they were not all of them. Whitfield came to America, and after preaching on Boston Common to twenty thousand people, he arrived, in December, 1739, at Williamsburg, and preached there in Bruton Church to a great multitude, producing great excitement.¹ In his diary² he says that Commis-

¹Cooke's History of Virginia, 336.

²"Williamsburg." Tyler, 141. Old Churches, Ministers, etc. Vol. I., 431.

sary Blair "received me with joy, asked me to preach, and wished my stay was to be longer." And he did preach, going through the country as a swift and skillful sower over well-plowed ground, scattering his seed, while Methodism sprung up like the green wheat in his tracks. There were some Catholics, not many, and of Baptists not a few. Lutherans in the Valley, Mennonites and Dunkards, Quakers and others, opposed to each other, but all opposed to the establishment. Against all these, their opinions and practices, the old order stood aghast and amazed. Disloyalty and hostility to Church was the same to the King; there could be no difference; and those who would disturb the fixed order of things were iconoclasts and public enemies. Among these "New Lights," no doubt, then as sometimes now, were some noisy, mouthy apostles, unctuous, tearful and slobbery, who excited the deep and quick antipathy of the old Virginians, and gave, in prejudiced eyes, their name and character to all. It was not to be expected that those of that period, accustomed to the solemn and dignified worship of the ancient establishment, would regard with equal respect those who, to them, were figuratively beating their tambourines upon the street corners.

The old order saw with alarm and indignation the little fences of the law soon broken down, and the fair gardens of their ancient enclosures trodden over by strange and ruthless feet.

Why should there be any new teachers or administrators of religion? Did not they already have daily family prayers at home, and grace at meals; did they not go to church on Sundays, and repeat the creed, standing by every word of it; were they not fair in their dealings with other men, hospitable to the last

crumb, good and affectionate to their families, kind to their neighbors and more than kind to their slaves, always telling the truth, paying their taxes, true to the State and ever ready to fight and die for the public weal? What more of religion could any man ask, and who were these people, these "New Lights," who talked with such irreverent familiarity about "the Word"? These were the questions these descendants of the Cavaliers put to themselves.

So, determined to stand by their old order, they planted their backs against the wall of Church and State, and defied the innovators. But State and Church had come to be, perhaps had always been, a bad combine,¹ and political events, hastening the serious issues towards revolution and independence, lessened the sense of difference in minor matters. So, before they knew it, the old order found that the wall had fallen behind them, thrown down, too, largely by their own hands; for in opposition to English usurpation, to stamp taxes, taxed tea, etc., religion and Church allegiance had made little difference save possibly to a few of the time-serving, or to some of the really conscientious clergy. And what came of it all we will tell about presently, but it must not be thought that the old order ever suffered these things gladly. They never did kiss the hands that spoiled their altars and threw down their temples. But they afterwards built them again much better than they were before.

It is naturally less pleasant to talk about the Church than about the churches and the people who said their prayers and listened to short sermons in them. Taken altogether, they were, perhaps, not so strictly pious as their religious adversaries, but they were

¹ "Monstrous," John Marshall called it.

certainly much more delightful to read about, and probably to have lived with.

It is hard to pass by, without special notice, Blandford Church, with all its attractive surroundings; the early churches at Hampton and Cape Henry; Curls Neck Church, Smithfield, Pohick and the many others¹ whose associations and environment tell so much of those early days. But such a narrative is beyond the limited compass of this writing. We must select one church only for special mention, and that because it, more than any other, was connected with the social, political and *law* history of the colony in the last seventy-five years of its existence as such,—the years of the eighteenth century that preceded the Revolution. That one is Bruton Church at Williamsburg.²

In another chapter³ we have seen that Williamsburg was the successor in name and place of the Middle Plantations, and that it was situated on the highest part of the ridge of land that lies between the James and York rivers, about seven miles from one, and twelve from the other. Before the name of King William had taken the place of the original title, there had been wooden churches there, and in 1677 some move was made to build a brick church, which, however, did not manifest itself until 1683, when it was erected "on the horse path in Middle Plantations' old fields."⁴

This church is said to have cost £800 sterling and was built largely by private subscription, although a

¹Yeocomico, still standing, and beautiful in the woods, was the church that Fithian frequently attended with the Carters.

²The story of this, though written here before reading the Rev. W. A. R. Goodwin's attractive book, has been since revised, and that book plentifully used for corrections and additions.

³The City. Chapter VI.

⁴Williamsburg. Tyler, 18. Old Churches, Ministers, etc. Vol. I, 146.

considerable levy in tobacco was made upon each tithable towards that object. It was dedicated in January, 1684, and besides such consecration services of the church as were used, tar barrels were burned,—this not because of its suggestiveness, but, it is said, because there being no bishop in the colony the regular church consecration service could not be used.¹ Later we find the Vestry considering a proposition to have a steeple and “a ring of bells” furnished for the church, the cost of which and the subscription to be taken up being the matters to be first determined—all of which reads very familiarly to modern eyes.

There seems to have been quite a number of ministers on short time contracts, and agreeing to preach sermons every other Sunday in the afternoons if the weather permitted, and to administer the sacrament twice in six months. The church building, then of brick, could not have been very substantial, for as early as 1694 there is talk about rectifying and repairing it, and the church wardens were directed to have this done as soon as they could.

The removal of the seat of government in 1699 from Jamestown to Williamsburg had its effect upon this church as well as upon the town generally, and we find repairs being made in 1699, 1702, and 1703, and in the latter year a new pulpit, the floor raised, etc.

This begins a more interesting period for us, because in 1704 Edward Barradall, Jr., the author of the reports to which all this is a mere introduction, was born. Sir John Randolph, the sixth son of William Randolph of Turkey Island, was born in 1693, so at this time he was eleven years old. They were both

¹Bruton Church. Goodwin, 16.

afterwards vestrymen of Bruton Church and were probably baptized there;¹ but of these more particularly presently,—only events about this time become more interesting when we know that they lived in the midst of them.

Two years prior to this, the minister in charge having died, the Rev. Solomon Wheatley was invited by the Vestry to preach preparatory to a call, which call was soon after made. But his time expiring at Christmas, 1703, in November he wanted to know whether he was to be retained. No action was taken until February, when he was informed that the Vestry did not wish to keep him for another year, but, not to inconvenience him, they desired him to continue to officiate until the 25th of March. At the same time Col. Ludwell was requested to communicate with the Rev. Mr. Isaac Grace, who had just come over from England, and ask him to give the parish a sermon so that the Vestry could see how they liked him, although they did not in so many words tell Col. Ludwell to say all this to Mr. Grace.

Col. Ludwell did as he was requested, and reported that he had asked Mr. Grace to give the sermon, but he had replied that while he would be glad to get such a good parish, yet the Governor had forbidden him to be concerned in it. Turning down the Rev. Mr. Wheatley was the trouble, for it made a point, as the Governor thought, against his prerogative, and Governor Francis Nicholson, being of a somewhat peppery disposition and given to standing up for his rights, determined to make the issue by retaining Mr. Wheatley

¹Edward Barradall's pew was No. 10, in the nave and on the left hand side of the aisle as you enter from the west end. Sir John Randolph's was No. 25, on the right hand side of the aisle and the second pew from the top. Both are marked with the names of their famous owners in the unique and attractive restoration of this church to its colonial condition.

in spite of the Vestry's dismissal, and so he had warned off Mr. Grace.

The Governor's contention was, that the English law determined the matter, and that he, as the representative of the sovereign, had the right of induction. The Vestry, on the other hand, claimed, that all this was their business, that they had a right to call whom they pleased and to contract to keep him as long as they wanted him, and that with the Rev. Mr. Wheatley (pronounced Whately) they had acted exactly up to their rights and his.

The controversy sharpened, and the Rev. Mr. Grace passed the lie to the Vestry, who seem to have returned it, the record being rather against the clergyman.¹ But the attorney-general, Sir Edward Northey, was called on for his opinion and he gave it² as follows:

"Ye advowson and right of presentation to ye Churches is subject to the Law of England, there being no express law of that Plantation made further concerning the same."

And therefore, when the parishioners presented the clerk and he was inducted by the Governor, the incumbent was in for life and could not be displaced by the parishioners, and if within six months any cure should become vacant and the parishioners did not present a minister to the Governor, he could himself by law name the minister, who should hold the place for life. The attorney-general further thought that if in such case the Vestry did not lay the tobacco for the minister's salary, the court must decree the same to be levied.³ So the Governor, sitting in council, sent this opinion to the Vestry and required them forth-

¹Bruton Church, 23.

²It is the second of the cases reported by Barradall, and printed from his manuscript in this volume.

³See this record as Appendix A. Bruton Church, 77.

with to read the same and enter it upon their books, "to ye end ye said Vestry may offer to his Excellency what they think proper therefor."

In response to this the Vestry requested Mr. John Page, one of its members, to draw an answer under certain heads, stating their position, not being content to accept this opinion of the attorney-general as the last word.

At this point the Rev. Solomon Wheatley took a hand in the proceedings, and on May 22, 1704, filed his petition, addressed to the Governor, but read before the Vestry in the Governor's presence.

Surely if the opinion of the attorney-general states the law correctly, the Rev. Mr. Wheatley makes a strong case and things look bad for the Vestry. But quite irrelevantly the Rev. Mr. Grace, who had no case at all, but seems to have wanted one, comes in now with a letter dated May 14, 1704, in which he utterly denies that he ever said any such thing as that he would be glad of so good a parish, etc., as Col. Ludwell had reported to the Vestry. But either the Vestry was satisfied with the accuracy of Col. Ludwell's report, or else, which is very probable, they thought that neither the incident nor the Rev. Mr. Grace, mattered at all; so no replication, special or general, appears to have been filed to Mr. Grace's complaint.

But the Governor was determined to carry his point, so he reinforces the opinion of the law officer with some instructions sent from England which indicate that the whole matter belongs to the jurisdiction of the Lord Bishop of London, and among these he shows an order of Queen Anne, as late as December 12, 1702. These instructions, the Governor directs, shall be now recorded in the vestry book, which was done.

By this time both the controversy and the weather had gotten quite warm, for it was June 3, 1704. But the Vestry, with some evidence of lack of confidence in its position, though with no idea of surrendering, brings up a side issue and states directly that the entry of those instructions on their books was "not made by order of the Vestry, but by his Excellency's immediate command to the Clark," which was an intimation that "the Clark" had better learn who his real master was.

And the Rev. Mr. Whately (as "the Clark" spells his name) comes in person before the Vestry and makes a diplomatic speech, telling them that what he did was by the Governor's command, and "I have never said to any person that I have a right to this parish, nor do I insist on a right to it."

This looked like a way out of it all, for if the Rev. Mr. Wheatley didn't claim the place, who could? But the day was probably warm, and, as the entry shows, it was then too late in the evening to consider the matter further, so its consideration was referred to the next Vestry. Still, before they adjourned, they put on the record a very respectful and quite conciliatory address to the Governor, which, however, they closed with the declaration that "We shall also use our Sincere Endeavors to supply ye vacancy, and give due obedience to the Law." This they could do if the Rev. Mr. Wheatley was out of it, as indeed he had substantially told the Vestry he was.

So at the next Vestry, on the 12th of June, 1704, the churchwardens were empowered to procure a minister, declaring also that Mr. Wheatley's recent preaching was "not any way with their consent or approbation, and that they think themselves no way obliged to pay him for ye same,"—which

looks like a complete defiance of the attorney-general's opinion. But Mr. Wheatley was there with another olive branch and to show that he was making no claim, delivered to Col. Ludwell the sum of ten pounds, charity money, which was in his hands.

However, the matter was not over yet, for the Governor commanded the Vestry to attend him at the college on Monday, the 19th instant, about ten o'clock. Whether they met or what occurred is not recorded, but an information was exhibited by the attorney-general in the name of the Queen against the Vestry, and they were commanded to answer the information at the next General Court. Therefore the Vestry empowered the two churchwardens "to defend and manage ye said suit."

Cool weather had by this time calmed the antagonism of Governor and Vestry. The Governor had shown a conciliating disposition by sending to the Vestry an altar cloth, with some money for the poor, and expressing the desire that his offer might be recorded in the vestry book as his usual quarterly gift. But while the Vestry thanked his Excellency for the cloth and the money, they were somewhat wary about recording things from him, remembering how those instructions got in the book, so they found a technical objection to making this entry then, promising to examine into the matter by the next Vestry.

But now, on October 25, 1705, this troublesome case comes to an end, not by decision of court, or obedience to the opinion of the attorney-general, but either the diplomacy or the genuine unselfishness of the Rev. Mr. Wheatley brought about a happy conclusion. The Vestry entered an order standing by all that they had said and done; but, while refusing to pay Mr. Wheatley for his past preaching at the Governor's

command, they gave him, "as a gratuity," sixteen thousand pounds of tobacco, and engaged him to preach until the following May. But he had taken quite a hold on the Vestry, and remained the minister until he died, in the fall of 1710, at which time Edward Barradall, Jr., was six years of age, and John Randolph seventeen, and both boys had no doubt often listened, or at least been where they might have listened, to his sermons,—young Barradall not thinking of manuscript reports, and surely not of recording and perpetuating for our entertainment the opinion of the attorney-general which declared the right of Mr. Wheatley to preach in Bruton Church.

The Rev. James Blair, known then and to posterity through all these years as "Commissary Blair," although he was at this time also the president of the young William and Mary College, was chosen rector of the parish and so remained through a long incumbency, indeed up to the time of his death, in the spring of 1743, which was just a few months before Barradall died. John Randolph had died some six years before, on the 9th of March, 1737. Both men had been members of the Vestry of Bruton parish; both had died at near the early age of forty; both were lawyers of distinction and writers of law reports; had held high office in the colony; and the manhood years of each had been spent under the pastorate of Commissary Blair.

The Rev. Mr. Blair was a very uncommon man and made an unusual stir in his day, and what he did and what came of it was necessarily a good part of the concern of the two men, a picture of whose surroundings it is the chief object of this chapter to give. So a few words about the Commissary.

Mr. Blair was a Scotchman and came to Virginia

as a missionary when he was twenty-nine years of age. He was rector of the Jamestown Church and in about four years was appointed Commissary, which to military ears means that the bearer of this title is in the peace department of the army. The Rev. Mr. Blair was never in any *peace* department of any organization, and the meaning of his title was that he was the highest ecclesiastical functionary in the colony, having the right to a seat in the council, to preside at ecclesiastical trials, and pretty much all the powers of a bishop, except the right of ordination, consecration and confirmation.

Very early he interested himself in the cause of education, and was the founder of William and Mary College, making several trips back to Europe on its behalf. As indicated, he was a fighter, mild and gentle as he looks in his portrait¹ on the college walls, with his long curly wig and his gown and bands. In doing what he thought he ought to do, he regarded neither governors nor his fellow clergy, and for the accomplishment of all his plans he manifested this same pugnacious sense of duty.

In the one incident of his life which I shall here briefly refer to, and which might have interested John Randolph, but not the infant Barradall, as it occurred prior to 1708, I am following the narrative of John Esten Cooke in his history, and the authority of Bishop Meade.²

The then Virginia Governor, Francis Nicholson, had been the Governor of New York, but because of some small tyrannies there, he was deprived of his office, and was made, instead, Governor of Virginia. After two years in Virginia he was transferred to

¹Williamsburg, 115.

²Old Churches, Ministers, etc. Vol. I, 159.

Maryland, but in 1698 he came back to Virginia and resumed the governorship.

Although a good deal of a demagogue, he was fond of display and often quite high and mighty in his manners. But at last he made a great fool of himself by falling intemperately in love with Miss Martha Burwell, one of the nine pretty daughters of Major Lewis Burwell. His manifestations of affection were of such a character that his passion was promptly rejected by the young lady, which, says Bishop Meade, "completely upset what little reason there was in Governor Nicholson of famous memory." He raved in public over his disappointment; denounced outrageously his successful rival and Miss Burwell's union¹ with him; declared to Commissary Blair that if the lady should marry any other man he would cut the throats of the bridegroom, the minister, and the justice who should issue the license. He was even jealous of the minister of the parish, Rev. Mr. Fouance, assaulting him and pulling off his hat. Commissary Blair was a stout friend of Miss Burwell, and at once took in hand her case with the Governor, which had become a public offence. He ridiculed Nicholson and laughed at his threats, and, chiefly at his instance, the council took prompt steps and preferred charges against him, and he was brought to trial at London.

In a fight in a court of law, whatever he may have been in a court of love, the Governor was no fool, and he was no coward in either. He made a grand fight and clouded the issue by some sharp blows at the clergy for their too great hilarity at the Raleigh Tavern. But he lost his case and his office too, and all that he

¹She married Col. Henry Armistead of "Hesse" in Gloucester County, Va. Williamsburg, 21.

gained was a severe letter from the Bishop of London to the Virginia Clergy begging them not "to play the fool any more."¹

Meanwhile, Commissary Blair reigned supreme in his kingdoms of church and college, for, though of the militant order, he was a good Christian man, self-denying and of fine ability. He lived a life of pre-eminent usefulness and died at a good old age, lamented and beloved by all the people.²

The story of the church, which carried us to the beginning of the Revolution, has brought us back again to the early part of the eighteenth century, and before we finish this chapter, with some reference to the great change in its condition produced by the results of the Revolution, we want to see what happened to the Quakers under the Governor who came, after an interval of two years, next to the amorous Nicholson. But of more importance than the Quakers is an incident of his coming, which seemed afterwards, and will seem for all time, to do away with discriminations because of or penalties imposed for differences of opinion on religious or other matters, or no opinion at all, on a subject not capable of adjustment in this world, and probably not of near so much importance to differ about as we are prone to think, in the next.

Col. Alexander Spotswood, he of the Golden Horseshoe, succeeded to this office, in 1710, as the deputy of the Earl of Orkney, who was the royal sinecure Governor, holding the title and drawing the pay for forty years without ever performing a single act of government. Spotswood had been a soldier under Marlborough, and had distinguished himself for both

¹Old Churches, Ministers, etc. Vol. I, 160.

²See more of him in the chapter on Education, *post*, Chapter VII, in connection with the story of the college which he founded.

military skill and courage, receiving a severe wound at the battle of Blenheim. He came of an ancient Scottish family which carried the coat of arms of the house of Gordon, but was born at Tangier, his father at that time a military surgeon, and on duty in that English colony in Africa.

Spotswood was not only the most energetic and efficient Governor the colony had ever had, but his coming was distinguished by an event as memorable on American soil as the granting of Magna Charta had ever been in the history of England. He brought with him the gift of the benefit of the *habeas corpus* act, which had been denied by the English Government when the General Assembly had endeavoured to extend it by their own authority.¹ If he had not otherwise distinguished himself in the service of the colony, this alone would have justified his great popularity and long continued fame.

Although thirty-four years of age when, in 1710, he came to Virginia, Spotswood was a bachelor, but that did not prevent the burgesses from building him a palace at Williamsburg at a cost of 3,000² pounds, nor did it prevent him from fulfilling all the rites of hospitality that were expected of a Royal Governor of Virginia.

In 1724, when he was forty-eight years old, he went back to London for a wife,³ but he had, two years

¹Dr. R. A. Brock. Letters of Alexander Spotswood. Vol. I. Introduction IX. But at the same time it is said that no enactment by the assembly regarding the *habeas corpus* act appears until August, 1736. Henning. Vol. IV. 489.

²It finally cost over six thousand pounds.

³Ann Butler Brayne, daughter of Richard Brayne, Esq., of Westminster. Introduction. Spotswood's Letters, XIV. For names of families in Virginia descended from this marriage see Introduction. *Id.*, XVI.

Col. Spotswood died June 7, 1740, and on November 9, 1742, his widow (for whose genealogy see Virginia Historical Magazine, Vol. II, 340) married the Rev. John Thompson. (See *ante* page 39.) From this marriage one child, a daughter, was born, and a numerous posterity in Virginia (the half kin of the first set) trace their descent from this marriage. If further complication of relationship were needed,

before that, ceased to be Governor; for having quarrelled with Dr. Blair, as the unlucky Nicholson had, but not because of the same offence, he too, although a mighty fighter, was overthrown by the Commissary.¹ But before he was thus unhorsed by the doughty doctor, Spotswood had had his tilt with the Quakers. Of them he wrote as "broaching doctrines so monstrous as the brethren in England never owned, and which cannot be suffered in any government,"² but so, indeed, in that day, was any doctrine that was not strictly orthodox. Some time later the Baptists, for the crime of denying all ordination and claiming that every one had a right to preach, were therefor dealt with by the law. So it was hardly to be expected that for a greater degree of unorthodox opinion the Quakers should fail to suffer the lash of orthodoxy, and they did not. Bishop Meade³ makes it clear that the extent of the penalties inflicted in most of these cases of early persecution have been much exaggerated, probably from the excess of religious zeal that entered

it is found in the fact that the Rev. John Thompson, surviving his first wife (the widow Spotswood) married again, and left issue from which also there are many descendants. An unusually interesting account is given by William Byrd of Westover, of his visit to the Spotswoods at Germana in 1732. His numerous references to "Miss Thekey," the old maid sister of Mrs. Spotswood, are quite entertaining. "Miss Thekey" did, however, after all, get married to a Mr. Elliott Benger (Virginia Historical Magazine. Vol. II, 340). This narrative of Col. Byrd is quoted in most of the histories of the times, but is given quite fully in the History of Orange County, by W. W. Scott. 87 *et seq.* (See "A Progress to the Mines." Writings of Col. Wm. Byrd-Bassett, 333). It was for Germana that Col. Spotswood set out in 1716 with some fifty companions and a most remarkable supply of wines and liquors of all sorts, and ascending the "Blue Mountains" passed through Swift Run Gap and down into the beautiful valley below, and thus seemed to dissolve the spell that for so long had hindered its exploration, and to open up to rapid occupation a country much superior by nature to the lower section with which the colonists had so long contented themselves, although this grand and fertile valley was so near, and only shut from sight by a chain of mountains of inconsiderable height and pierced by many gaps, affording comparatively easy access.

¹Old Virginia and Her Neighbors. Vol. II, 387

²Old Churches, Ministers, etc. Vol. I, 427.

³*Id.* See also the note about and review of "Southern Quakers and Slavery," pages 168-172, Virginia Historical Magazine, vol. VII, where the subject is fairly treated and valuable references given.

into the politics of the state before and immediately after the revolution, and which, having been once so written, have been handed down to the later generations with the usual additions.

By 1710 the Church at Williamsburg that had been so often repaired had "grown ruinous,"¹ and a great movement was made to have a new church, consistent with the dignity of the capital city. Governor Spotswood, as he did in anything that concerned the public interests, lent a hearty hand, and worked well in harness with Dr. Blair. Such a team could not fail to pull through; so, by December 15, 1715, the new church was "finished," and by another year all the material of the old church, except the brick, had been disposed of. But while it is related that the church was finished in 1715, it is also said that it was shingled in 1717, which leaves an uncomfortable sensation of worshipping by skylight!

But the new church later, and now also with the roof on, was laid off in pews and a gallery, appropriate to the dignity of those who were to sit in them.² In part of the gallery, as usual, were the college boys, with the right to a lock and key to the door by which they got there.

Even a private individual, though he was a distinguished lawyer,³ was allowed to erect a gallery for his personal use at his own expense, and others afterwards were allowed to do the same. The Governor had his place, with platform, canopy and chair, and there were places where the burgesses sat, and an organ and a bell, and a wall was built around most of the two acres of churchyard, where are the graves

¹Williamsburg, 98.

²See *ante* page 93 for location of Barradall's and Randolph's pews.

³Williamsburg, 99. John Halloway was the lawyer. But as this was not properly a part of the church it was not restored. His pew was No. 6, in the nave.

of so many who were then engaged in making the infant State, although they did not know it.¹

Now we must leave this more interesting part of the subject, and come for just a little while to the days of the Revolution, to a time so destructive to the institution identified so closely with all that affects this story of the Virginia Colony from its very beginning.

The State, which was England, from being the object of the most intense loyalty and affection, had, for causes so well known, become the object of hatred and detestation. And the Church, which was a part of the State, naturally shared that revulsion of feeling, at least of that large part of the population which was hostile to it, independently of mere political reasons. The Presbyterians had suffered from it, and had good memories, and this slogan was added among the people to these twin unpopuliarities by the pungent sentence, "A State without a King and a Church without a Bishop."

It is true Virginia had no bishop, but one had been talked about, although it did seem as if those denominations which got along so nicely without this third order and were so well content with two, might have been satisfied to let those have it who wished it.

But some of the clergy, still content to cling to Church and State after the State refused to do so, had become the public enemy, and if the rule is that no man can safely serve two masters, they would hardly be let to serve three; especially when the boys were beating the drums and wearing cockades in their hats, that did not have the colors of old England.

How far this disloyalty of the clergy went is a vexed

¹For an interesting account of all this see "Williamsburg," 100 *et seq.*, and for an account of the restoration of the church some two hundred years after, see "Bruton Church Restored," by Rev. W. A. R. Goodwin, A. M., to whom the credit for this fine work is principally due.

question. The Rev. Dr. J. R. Graham says¹ that in striking contrast with the course of the Presbyterian clergymen, *the great majority* of the clergy of the Established Church stood for the King against the Americans, as it seemed to be their respective interests to do.

Dr. Graham gives no authority for the statement that "a great majority of the clergy" were disloyal, except a quotation from Dr. Chandler, who was one of them, and who said that "Episcopacy and monarchy are, in their form and constitution, best suited to each other. Episcopacy can never thrive in a republican government, nor republican principles in an Episcopal Church,"—which statement is wholly controverted by subsequent events.

But Dr. Graham, no doubt, wrote from the established traditions of the great communion of which he is a much loved and very eminent member, and that he believed the statement is best proved by the fact that he wrote it.

Mr. Henry Cabot Lodge's account is more an assault upon the aristocratic tendencies of the ruling class of the colony, than it is upon the clergy. He gathers together the intolerances of the age, and groups them as if they were all entertained by the Established Church against the dissenters,—the narrow discriminations made by the law against all other denominations, and the instances of unworthiness among the clergy, culled from its history during more than a century and a half, as if they supported the charge that "here and there might be found a man of exemplary life and high character,"² whereas this "here and there" really counted the unexemplary. He does not distinctly declare that a great majority of the clergy were disloyal

¹The Planting of Presbyterianism, 129

²English Colonies in America, 60.

but he seems by contrast to suggest it, in the sentence, "The dissenters to a man, were on the patriotic side, and public opinion could not consistently overlook religious freedom in a struggle for political liberty."¹ His tone too, through the pages devoted to this subject, is one of general denunciation, and of such harshness as to mar the apparent fairness which generally characterizes his narrative, otherwise so interesting and attractive.²

On the other hand, Bishop Meade says:³ "The attachment of *some few of the clergy* to the cause of the King subjected the church itself to suspicion, and gave further occasion to its enemies to seek its destruction." Neither has Bishop Meade cited authority for this statement, but it is susceptible of proof that he had at the time in his possession the evidence, presently to be referred to, that entirely sustains what he has said. But the matter has been subjected to an investigation almost as severe and quite as reliable as a trial in a court of justice.

Mr. R. S. Thomas of Smithfield, Va., lawyer and scholar, published, in 1907, the result of his careful examination of this question. There were ninety-five parishes in the colony, or rather in what had then become the state. Three of the parishes had no minister, but in the ninety-two parishes were ninety-six incumbents, and there were also nine others who had no parishes, making in all one hundred and five. The history of each one of these was examined into separately, and it is remarkable how much material was

¹English Colonies in America, 59.

²While reflecting so upon the loyalty of the clergy of the Virginia Church Mr. Lodge probably did not know that of the one hundred and forty-three graduates of Harvard residing in Massachusetts, who were tories, nine were of the Established Church, while eleven were members of the Congregational Church.

³"The Loyalty of the Clergy." R. S. Thomas, 18.

⁴Old Churches, Ministers, etc. Vol. I, 16.

discovered from which fair inferences could be drawn. Of these one hundred and five no evidence whatever could be discovered, one way or the other, about six; six were proved to be disloyal to the colony and one loyal up to 1781 but disloyal afterwards; the remaining ninety-two were fully proved to be loyal to Virginia. In some cases (there were twenty by the count) of those pronounced loyal the entry is, "Not a word against him." Of these Mr. Thomas says, "I could not in all cases find positive and affirmative evidence of the loyalty and exemplary conduct of each and of every minister. In some cases I had to infer it, and I did not hesitate to do so. When I found a minister in a parish before and during the war, or during and after the war, and could not find one word to his prejudice, I have inferred he was loyal and exemplary, because if he had not been he had a plenty of enemies to pick him to pieces and to ruin any except the very best of reputations."

Perhaps there is no better test of a man's character than to have it said that no one had anything to say against him.

Though not directly to the purpose here, it is fair to note that this investigation was also addressed to the question of the moral and religious character of the ministers, with the result that eighty-eight were pronounced exemplary; three were pronounced not exemplary, and one disreputable; the remainder were, for one cause and another (in one instance of a quarrel with the Vestry) not passed on. One was pronounced "disloyal and disreputable in the extreme," and one of the same name, but of a period seven years earlier, is spoken of as "this great moral reprobate and monster."

Among the number pronounced loyal was General

Muhlenberg of Shenandoah (Dunmore) County; and a number of the clergymen were found to be members, and sometimes chairmen of the Committees of Defense, while no clergyman of any other church was found so serving.

As to the opinion, so long and so generally held, that this charge of disloyalty of "the great majority of the clergy" was true, it is a fair conclusion to think that these religious adversaries were not exactly impartial judges of each other, that the provocation of the discriminations against them and in favor of the privileged establishment was impossible to be submitted to serenely, though it was merely the ancient law, that the age was not one of large and tolerant thinking; and it is true that in the midst of arms it is not alone the laws of the land that are silent, but also those of reason and fair judgment. The boys who pelted the statue of the representative of King George III,¹ that stood before the old Capitol at Williamsburg, were understood as metaphorically throwing rocks also at the representative of the Church of which the King was the head, and the overturning of the one on such issues was regarded as the necessary destiny of the other.

No other count than that made by Mr. Thomas on the question of morals, seems ever to have been undertaken, and besides that striking piece of testimony, all the corroborating circumstances seem to indicate that it was only the few who were guilty of any acts of immorality or irreligion, although naturally the few gave a bad name to the whole body.

As to a freer way of living,—an occasional game of cards, a glass of wine, a ride after the hounds, or even

¹Lord Botetourt. The very fine, though mutilated, statue stands now in front of the main building of William and Mary College.

the casual observing of a horse race, called in latter days, under similar circumstances, a trial of speed,—these seemed, and probably were, harmless to those accustomed to them, while to those who not “only observed the weightier matters of the law but also “tithed the mint, anise and cummin,” these things were strong cause of offense. The lay and clerical people of the old order had never fixed their standards so that they would have been shocked, as were the good people of “Timber Ridge Church,” at seeing their fine old pastor, the Rev. Samuel Davies, “carrying a gold-headed cane and wearing a gold finger ring,” or scandalized as was the Staunton Church, when the Rev. James Waddel,¹ the blind preacher, was guilty of “flagrant Sabbath breaking by drinking hot coffee on a Sunday morning.”² But whether the church deserved destruction for all this or not, it got it. Of over ninety parishes with ministers at the beginning of the Revolution, at its close there were but twenty-eight.

The Revolution, and the disestablishment that followed, deprived the clergy of both parishioners and income; and a state of war, or its aftermath, was no time in which to reconstruct upon a new basis. At first the church was incorporated and her property secured to her, but by the Act of January 9,

¹The Loyalty of the Clergy, 18. Annals of Augusta County. Waddel, 197, 416.

²On page 118 of his Journal, Fithian says of Rev. James Waddel, “There is also in these Counties one Mr. Waddle a presbyterian Clergyman, of an irreproachable character, who preaches to the people under trees in summer & in private Houses in Winter. Him, however, the people in general don’t more esteem than the Ana-baptist Preachers, but the People of Fashion in general countenance and commend him. I have never had an opportunity of seeing Mr. Waddle, as he is this Winter up in the Country, but Mr. & Mrs. Carter speak well of him, Mr. & Mrs. Fambleroy also, and all who I have ever heard mention his name.”

A note to this extract states that Dr. James Waddel resided in Lancaster and Northumberland counties from 1762-1788, spending a part of each year in the upper country, where in his later years he lived constantly. Foote’s Sketches of Virginia, 1, 367, 387. He died however at his home in Orange County, and is buried about one mile southwest of Gordonsville. History of Orange County, Scott, p. 180.

1787, the Incorporating Act was repealed, and by the further act of January 24, 1799, all acts of any kind securing the property of the church were repealed. On January 12, 1802, the glebe lands held by the church were ordered to be sold for the benefit of the public. This act was contested in the courts and at first decided by the Court of Appeals in favor of the church by a vote of three to one, but before the opinion was written one of the three judges died, and his successor, siding with the minority, made a divided court, which affirmed the decision of Chancellor Wythe¹ who had decided in the Lower Court against the church. And this seemed to be the end of the church which had held its first service beneath the shelter of an old sail on Jamestown Island near two hundred years before.

Chief Justice Marshall said that he thought the Episcopal Church in Virginia so dead that it was not worth while to attempt to revive it; and though not a member of any church, he loved the liturgy and services and methods of the Episcopal Church and worshipped in it, as did all of his large connection. But even the judgment of so sagacious a man as Marshall could in such a case be at fault; for the church was revived and then freed from its uncongenial yoke-mate, the state, from the burden of favoritism and unfair discrimination against other religious bodies, and from a priesthood fed at the public crib, which the protection of the state imposed upon it, it was given new life and took its place among the workers for good, far higher than it ever enjoyed when upheld by the favor of royalty or the special privileges of the law. And more than to any other man, in Virginia at least, this result is due to the courage, character and

¹Turpin v. Lockett. 6 Call. 113. Selden v. Overseers. S.C. xi Leigh, 127.

ability of that brave and gentle old bishop, its accomplished historian and defender, who was its leader through its most trying days,— the Rt. Rev. William Meade.

CHAPTER VI

THE CITY

Conditions in Virginia have never favored the building of large cities. At the beginning of the revolutionary war the colony was about one hundred and seventy years old, and yet there was in it no collection of houses worthy of being called a city. But so far as the acts of their representatives in the General Assembly can be taken as indicative of the wishes of the people, this lack of cities was not due to any want of ambition on the part of the people to have them. Mr. Lodge¹ quotes Col. William Byrd as saying that the system of life, the country, and the popular habits were all opposed to them; and other writers, while admitting that the popular aversion to towns was very strong, yet say that this was due "to indolence, jealousy, and the desire of every planter to have the port of entry at his own door."

Although great efforts were made to induce cities to be built, and encouragements of all sorts held out to secure inhabitants for them, it was yet true that the popular wish of the planters seems to have been not themselves to constitute any part of their population. From the beginning the political divisions of the country seemed to anticipate only a bucolic life and agricultural industries. The plantation was the unit, while a certain aggregate of plantations constituted the hundred.² Later, shires were formed, and then counties, but, except in the case of Jamestown, there was little talk of cities and less real expectation of them.

¹English Colonies in America, 52.

²Sir Thomas Dale's plan. Economic History of Virginia. Vol. I, 210.

But later still, in 1662,¹ because "his sacred majestie by his instructions hath enjoined us to build a town, to which"—with some degree of disingenuousness, the preamble adds—"our own conveniences of profit and securitie might urge us, yett encouraged by his majestie's royall commands, to which in dutie wee are all bound to yield a most readie obedience, this grand assembly taking into their serious consideration the best means of effecting it, have in reference thereto enacted."

All of which seems to be an admission that while they personally did not desire, nor see the need of towns, yet, as his "sacred majestie" so desired, they would have them if acts of the assembly could procure them.

This particular town, by way of a commencement, was to be at James City, for which, although after fifty five years trial the laws of trade had failed to accomplish that dignity, the laws of the General Assembly were now to be tried to see what could be done by them. Thirty-two brick houses, and more of wood, of a certain dimension were to be built, of which each of the seventeen then existing counties was to erect one. For this purpose they were to impress laborers who were to be paid a certain wage fixed by the act, and "for avoideing the exaction of workemen" the price of bricks was fixed at a certain price per thousand. Then, when the city should be built, all the tobacco of certain of the counties, under penalties for refusing to do so, was to be brought by the planters and stored in the city. There the ships were all to ride at anchor, and merchants were to "keep their stores only at this towne;" and here numerous other provisions are made for the concentration by law of all trade at this city, and sharp penalties are imposed for their violation.

¹Hening Vol. II, 172.

That nothing might seem to be left undone, or rather unenacted, a system of rewards is also proposed, and the statute offers exemption for two years from liability for arrest, execution or process of law, to such persons as should live within the limits of the town, or while coming to or going away therefrom, except in cases of debts contracted within the town limits, or of persons accused of capital crimes.

Doubtless the burgesses themselves did not regard these provisions as being in any wise personal to them, for they had no idea of leaving the sweet countryside and the gentlemanly occupation of planting, to take up in a town, trade or merchandise or commerce, but whether their hearts were in the matter or not they did not cease passing laws on the subject.

In 1680¹ and again in 1691,² acts "for cohabitation and encouragement of trade and manufacture" were passed, which provided for the establishment, at numerous points in the colony, of storehouses, in which was to be accumulated tobacco for transportation, and for the sale and disposal of goods imported or exported. As was customary, prices were fixed, penalties imposed and restrictions directed against purchases and sales at any other place except at those thus appointed. But the pursuits and occupations of the people and all their habits and instincts, as well as their pleasures and their profits, being against these devices, they did not work, and the mandates of the legislature were wholly ineffectual to compel them.³

The cities did not come, nor any towns then. Here and there, where country stores had been located, were small villages, but for the legislated towns there was only the storehouse, erected by authority of the

¹Hening. Vol. II, 471.

²Hening. Vol. III, 16, 30, 50, 121.

³Old Virginia and Her Neighbors. Vol. II, 512.

law, and a small office for the transaction of small retail trade, and what were afterwards called the county towns were planted in the midst of the forest, and usually consisted of the courthouse, the prison, stocks, pillory, whipping post, and a poor little inn which might reasonably have been regarded as a part of the penal equipment of the shire or county. Here and there quite good country stores grew up, with very respectable men for merchants, but with what reads now as curious and remarkable assortments of merchandise.

It was these stores, says Mr. Fiske,² which served to the planter and other country population all the purposes of large centres, without their disadvantages, and which had successfully competed with the town building idea. Indeed the whole scheme was dead against both the natural conditions of the country and the strong inclinations of the people, whose affections were set on country life and the attractive pursuits of agriculture.³

The rivers, great and small, the many navigable creeks, and the bay with its great estuaries reaching back into the fertile lands, flowing together, making the splendid harbor of Hampton Roads,—the river sides and points of land with deep water up to the very edges, fixed by nature for holding great cities and floating at their very docks the commerce of the world, and all these looking out safely through the gateway of the capes at the rolling sea beyond, appealed in vain against the seductive sweetness of the country, the mild prosperity, the peace and quiet of a land undisturbed by the alarming headlines of daily papers, the horrors of suffering humanity through all the world,

¹English Colonies in America, 51, 52.

²Old Virginia and Her Neighbors. Vol. II, 213.

³Economic History of Virginia. Vol. II, 523.

the fluctuations of stocks and bonds, and the wild panics of financial centres, or wars or rumors of war, near or distant.

Against these things, undreamed of, but yet to come, against the name or fact of city or town, the planter opposed the conditions of his happy life upon his many acres by the river side, where the ships that sailed across the sea might tie up along the banks, in sight of the growing products which were to make the cargoes home again. There could be no argument, and no prophetic vision that could overcome the logic of conditions such as these.

Jamestown never was more than a little village. Norfolk, more ideally placed than any other spot in Virginia for a city, or, as it then seemed, than any spot on the long coast of North America, had at the time of the Revolution attained only to the dignity of a population of six thousand, while Richmond, as late as 1790, had but three thousand seven hundred and sixty-one inhabitants. At that time Philadelphia had a population of thirty-five thousand, with New York a close second, with twenty-five thousand people, although the total population of Virginia was then about equal to that of New York State and Pennsylvania combined.¹

But in those days the volume of trade was not dependent either upon cities or upon the concentration of large bodies of people in any form. Dr. Curry says² that "in the ten years before the revolutionary troubles (1760-69) the southern colonies, with a population of one million two hundred thousand, exported produce to the value of \$42,297,705, while the exports of New England, New York and Pennsylvania, with a popu-

¹Old Virginia and Her Neighbors. Vol. II, 211.

²The South, 84

lation of one million three hundred thousand, were only \$9,350,035, or less than one-fourth; . . . Virginia and Maryland exported five times as much as New England, eight times as much as New York, and over thirteen and a half times as much as Pennsylvania;" and he further says that at the end of the confederation time, and the beginning of the government under the Constitution, Norfolk had a greater trade than New York, and that for the first quarter of the century the South took the lead of the North in commerce.

Shortly before the Revolution Norfolk was the most considerable town in Virginia and held its ascendancy for many years. Williamsburg, the capital, is described¹ as "a straggling village of about two hundred houses, . . . a pleasant little town, with wooden houses and unpaved streets."

Petersburg, Fredericksburg and Alexandria owed their existence to the system of government warehouses for the inspection of tobacco and were built up by it; "but these places were, after all, mere unpaved straggling villages, with no business outside the tobacco houses, and inhabited chiefly by liquor dealers, small shopkeepers, and smaller lawyers, who preyed upon the country people of the neighborhood."²

The Rev. Mr. Fithian³ describes Winchester in 1776 as "a small village half a mile in length, and several streets, broad and pretty full. The situation is low and disagreeable. . . . The land is good, the country is pleasant, the houses in general large."

Twenty-two years before, a Moravian missionary⁴ mentions this little town in his diary, as consisting "of about sixty houses, which are rather poorly built,"

¹English Colonies in America, 51.

²English Colonies in America, 52, City—Roche foucauld, 1-21.

³The Planting of Presbyterianism, 3.

⁴Virginia Historical Magazine. Vol. XII, 141.

and "Augusti Court House" (Staunton) as "a little town of some twenty houses, surrounded by mountains on all sides."¹

Thus far had the city building scheme progressed in Virginia about the time of the Revolution. Seventy-five years before, Jamestown, left to the bats and the owls, had been abandoned as the seat of government, and the capital transferred to the Middle Plantation, now called Williamsburg, after King William. This was the only official city in Virginia and here our interest must centre for the rest of this chapter.

But for a little while, as germane to the city question, let us look a little more closely into the industrial and commercial conditions of the colony. The planters shipped direct from their own plantations, because it was much more convenient and profitable to do this than it was to load their products in boats and float them to the paper cities and towns, and there unload and load again, besides complying with all the various requirements of the law enacted merely for the purpose of forcing the building of cities and towns and with little regard to the sacrifices exacted on that account from the planter. Where the necessity existed for hauling overland, because of the absence of possible roads, it could not be considered at all.

As there was little or no commerce except directly with the consumer, so there were no manufactures, worthy the name, carried on by middlemen. Such articles needed on a plantation as were not brought to the planters on the incoming ships, as all articles of luxury were, were generally made on the plantation by the slaves. Cloth was woven and the clothing of the slaves cut and made up there. Carpenters, blacksmiths, painters, shoemakers, coopers and tanners,

¹Virginia Historical Magazine. Vol. XII, 146.

from among the slaves, were taught these trades and worked at them for their masters. Even barbers were among the house slaves, and learned to do their work quite satisfactorily.

But house building, except the simple and rough quarters and outbuildings needed on the estate, was beyond the capacity of the plantation mechanics. For this work, when mechanics from the country around, living in the villages which grew up around the country stores, could not be had of sufficient numbers and skill, others were imported from England,¹ and as the need for their services increased, privileges and exemptions from levies were offered by law to such of them as would settle in the country and continue there at their trades.² Even tailors were sometimes imported to serve the wealthy planter,³ although generally he had his fine clothes made in London.

Iron-making was an industry entered into early in colonial times, with much enthusiasm, and much money was lost in impracticable experiments. Laws enough were passed to regulate and control this industry too, but little or nothing came of them, and the industry was a failure, although the raw material of all kinds, and in close conjunction, was abundant. But the methods were crude, transportation was almost impossible, and at that time the richer beds of ore had yet to wait very many years before they were to be discovered.

Other industries,⁴ such as the manufacture of linen, silks and woolen goods were tried, but except on the plantation (and then only of linen and wool) and for

¹Economic History of Virginia. Vol II, pp. 403, 406.

²*Id.*, 411.

³*Id.*, 448, 471.

⁴Gunpowder was made in Frederick County before the Revolution. Fithian, page 214.

plantation uses, these manufactures did not succeed. Two powerful influences worked against all such enterprises,—the strong disinclination of the planter to do anything except cultivate the land, whereby a mere exchange of his products for all the articles he needed procured for him all the manufactures that his wants suggested; and perhaps the even stronger desire of the English government to discourage manufactures, so that, as far as possible, the necessities of the colonists could minister to the prosperity of the manufacturers at home.

So everything combined to dispense with this attempt at city making; and at no time during the colonial period was there ever a town of any considerable size, Norfolk, with its six or seven thousand inhabitants, being the largest.

Williamsburg might be called a city by brevet, for the act of Assembly¹ which established it is entitled "An Act directing the building the Capitol and the *City* of Williamsburg." Its population sixty years after it became the capital was only about one thousand, and at no period did it exceed between two and three thousand. Its streets were without paved sidewalks, and the houses were generally small and principally of wood and separated from each other, doubtless from fear of fire,—an apprehension which experiences at Jamestown fully justified. Nor had it any trade or manufactures, for there was none of either that such a town could have. But it was the capital, where the State House, now called the capitol, the palace, the largest church, and, later, the college, were. It was the seat of government and the centre of fashion, and then probably the gayest place on the American continent, with much good

¹Hening. Vol. III, 419.

company at all times, and especially when the General Assembly was in session. And when there was a popular Governor who entertained liberally, it was hard to deny to the little town the complimentary title which the General Assembly had given it even before it was born.

About sixteen years after the landing at Jamestown, a pale, or fortified fence, had been built across the peninsula at the narrow part where creeks from both the James and the York make into the land nearly opposite to each other, thus making the distance across the land from one water to another only about six miles.¹ Hence the palisade of that length cut off from the forest all of the peninsula south of it, an area about forty miles long by twelve miles broad. The fence had houses along it at intervals, and a force of men to defend it sufficient to protect all the country south of it from attacks of Indians, and to afford a refuge to persons living beyond the pale in time of danger.

The Middle Plantation was along this palisade, nearer to Jamestown than to the York River, and upon a well-drained ridge, healthy and free from mosquitoes. A little settlement had grown up here, and at the time of Bacon's rebellion it was the centre of his operations, and after the failure of that enterprise the scene of Governor Berkeley's vengeful and murderous executions. An English regiment sent out to suppress Bacon, but arriving after this affair was all over, camped there and the Governor, Jeffreys, who succeeded Berkeley, held important conferences with the Indians at that point.

At the end of the seventeenth century, when Francis Nicholson² was Governor, the State House at Jamestown

¹Williamsburg. Tyler, 10.

²The Lover. *Ante* page 160.

had burned down, and the government and people at length convinced of the impossibilities of that unhealthy place, the act,¹ already mentioned, was passed for the removal of the seat of government to the Middle Plantation, now to be called Williamsburg, after King William, and there to be erected a building "by the name of the Capitol" for the use of the General Assembly and the courts.

The act prescribed with great exactness and detail the style and dimensions of the building, and the sum of two thousand pounds sterling was appropriated to pay for it.

Two hundred and eighty-three acres, thirty-five and a half poles, were set apart for the city to be built upon; roads to the ports or creeks on either side were to be constructed and ports established there; the city was to be laid off in streets and lanes, and very careful instructions for the building of the city were given in the act.

Trustees, whose names were given, were to hold the title to the land on which the city was to be located, and these trustees were required to make conveyances of lots to such persons as should wish to purchase, with the condition that dwellings of certain dimensions should be erected on them within a limited time.

The Governor was to incorporate the city, and the corporation was to establish laws, rules and ordinances for the city government. To the Governor and Council and a committee of burgesses was intrusted the laying off of the city and the building of the ports, but all was subject to certain express directions contained in the act.

It was originally intended to lay off the city in the shape of a cypher, but that being deemed impracticable

¹Hening. Vol. III, 197, 419.

another plan, with most generous widths and distances, was adopted.

The one thing especially insisted on was Duke of Gloucester street, which was to be the main thoroughfare, and this was to be about a mile long and ninety-nine feet wide, with the college at one end and the capitol at the other, although back of the capitol there was quite a space laid off in streets and lots, but with some irregularity.¹ In compliment to the Governor, who does not seem to have been overly modest about it, two streets were laid off,—one on either side and parallel to Duke of Gloucester street, one of which was named Francis and the other Nicholson, which names had at least the advantage of brevity,—over the main thoroughfare.

The act² was as precise about the exact manner in which the capitol should be built as it was about any of its other objects, and the committee “appointed for the revisal of the laws” was required from time to time to inspect and oversee the building until it should be finished.

Of the completed work the Rev. Hugh Jones, A. M., in his “Present State of Virginia,” containing about a hundred and fifty pages and published in 1722, says it was a “noble, beautiful and commodious pile,” and doubtless it was, compared to all its surroundings, and it must be borne in mind that the Rev. Hugh Jones had been many years in the colony and was necessarily speaking comparatively.

But as this was the capitol that stood during all the manhood time of both Edward Barradall and Sir John Randolph, in which both of them served as members of the General Assembly, one as treasurer

¹For plan see “Williamsburg.” Frontispiece.

²Hening. Vol., III, 420.

of the colony and speaker of the House of Burgesses, and the other as attorney-general and judge of one of the courts, also having practiced before the courts which held their sessions in the building, this capitol is of special interest, enough to make us desire to know more particularly what manner of building it was.

Taking Rev. Hugh Jones' account of the building we find of its interior that "In this is the secretary's office, with all the courts of law and justice, held in the same form, and near the same manner, as in England, except the ecclesiastical court. Here the Governor and twelve counsellors sit as judges in the General Courts, in April and October, whither trials and causes are removed from courts held at the Court Houses, monthly, in every county, by a bench of justices and a county clerk. Here are also held the Oyer and Termener Courts, one in summer and the other in winter, added by the charity of the late Queen, for the prevention of prisoners lying in jail above a quarter of a year before their trial. Here are also held court-martials, by judges appointed on purpose for the trial of pirates; likewise courts of admiralty for the trial of ships for illegal trade. The building is in the form of an 'H' nearly; the secretary's office and the General Court taking up one side below stairs, the middle being a handsome portico leading to the clerk of the assembly's office, and the House of Burgesses on the other side; which last is not unlike the House of Commons. In each wing is a good staircase, one leading to the council chamber, where the Governor and Council sit, in imitation of the King and Council, or the Lord Chancellor and House of Lords. Over this portico is a large room where conferences are held, and prayers are read to the General Assembly, which office I have had the honor for some years to perform.

At one end of this is a lobby, and near it is the clerk of the council's office; and at the other end are several chambers for the committees of claims, privileges and elections; and over all these are several good offices for the receiver-general, for the auditor and treasurer, etc.; and upon the middle is raised a lofty cupola with a large clock."¹

The act of assembly² authorizing the erection of this building provided for a lot of ground four hundred and seventy-five feet square, upon which it was to stand, and a railing was to have been put around it, but by an act of 1704 this was changed and instead³ the grounds were enclosed with a brick wall, two bricks thick and four and a half feet high, distant sixty feet from the east and west ends of the building, and fifty feet from the north and south ends. "The bounds of the capitol were made to include the prison grounds as far as the spring, and stones were sent for and set up to distinguish the public property."

From Mr. Jones' description the act of assembly does not appear to have been exactly followed in the erection of the building, but it is probable that the dimensions then fixed were observed. Four compartments of the ground floor were to be twenty-five feet in length, in one of which was to be the grand staircase to the story above.

"This left in each building a room fifty feet long at each circular end, which was to be covered with flag-stone. . . . The width of each part of the capitol was ordered to be twenty-five feet, — from inside to inside. . . . The grand folding doors, six feet in width, opened upon three porches and afforded an entrance into the respective buildings. The first story was to

¹See Howe's *History and Antiquities of Virginia*, page 322.

²Hening. Vol. III, 197, 213, 419.

³Williamsburg, 208.

be fifteen feet pitch, and the second story ten feet pitch. The entrance doors and windows of the first story were to be arched. The portico joining the two parts of the capitol was to be thirty feet long and twenty-five feet each way, raised upon piazzas and built as high as the other parts. Over the middle of the gallery was ordered a cupola to reach above the rest of the building. On it was to be a clock, and upon the top was to float, upon proper occasions, the Union Jack of Great Britain."¹

The origin of the fire which destroyed this fine building is not known, but it progressed slowly enough to enable the public records to be removed. The burning of the capitol building gave opportunity for an agitation for the removal of the seat of government to some other place, and a committee of the House of Burgesses having been appointed to consider the subject, a report was made, adopted by the house, and a bill ordered for the condemnation of six hundred acres of land "near New Castle, on the Pamunky River." And this bill, in spite of the protestation of the people of Williamsburg, passed by a vote of forty-four to twenty. But the bill was defeated in the council, and Williamsburg was saved for the time.²

The assembly did not meet again until October 27, 1748, and after much opposition and a hard struggle on the part of "The City," a bill was passed providing for the erection of a new building on the old foundation. This was commenced April 1, 1751, and the last of the brick work completed in December of the same year.

John Blair, of the Council, who fifty years before had laid a brick in the first Williamsburg capitol, laid

¹Williamsburg, 205.

²*Id.*, 209.

also the first and the last brick in the new building.¹ In less than two years the building was completed for occupation, and is thus described by Mr. Jefferson:² "The capitol is a light and airy structure, with a portico in front, of two orders, the lower of which, being Doric, is tolerably just in its proportions and ornaments, save only that the intercollonations are too large. The upper is Ionic, much too small for that on which it is mounted, its ornaments not proper to the order, nor proportioned within themselves. It is crowned with a pediment which is too high for its span. Yet on the whole it is the most pleasing piece of architecture we have."

The act does not, as did the act for the building of the first capitol, specify in detail the style and dimensions of this building, but appoints a committee, of which John Blair was the chairman, to contract for the work and to see to its execution. The new building was intended to be a temporary affair, for the fourth clause of the act³ states that rebuilding on the old foundation was not intended to be construed as fixing the seat of government at Williamsburg, and that the new capitol should only remain as a building for holding General Assemblies and General Courts until such time as it might be thought more convenient and advantageous to commence a building for these purposes "to be erected in some other place, more convenient to the inhabitants of the colony, and commodious for trade and navigation."

Except the brief account given by Mr. Jefferson, we have no description of the interior of the new building. The picture⁴ represents a brick structure

¹Williamsburg, 210.

²*Id.*

³Hening, Vol. VI, 197, 1748.

⁴Williamsburg, 212. Howe's History and Antiquities of Virginia, 329.

with six upper and four lower square-topped windows in front; an ample portico with six columns above and four below, with a high pointed top reaching apparently as high as the comb of the roof of the main building. The roof of the building is high, with a long slope, hipped at either end, and with tall brick chimneys projecting through the hips. There are around it Lombardy poplars appearing over one end, and a grass plat with a driving circle to the front. The brick wall enclosing the grounds of the first building is supposed to have served for the new.

This new capitol is fuller of interest to the patriotic reader than the old, for it was in it that Patrick Henry, on May 29-30, 1765, made his "treasonable" speech, and offered his resolutions against the stamp act; where Dabney Carr, on March 12, 1773, moved the appointment of a committee, which was unanimously adopted, to correspond with similar committees in the other colonies, and where, on May 15, 1776, Virginia passed the act of secession from the Kingdom of Great Britain, drafted by Edmund Pendleton, offered by Thomas Nelson, Jr., advocated by Patrick Henry and adopted without a dissenting vote.¹

It was from their room in this building, in 1774, that the burgesses were summoned before him by Lord Dunmore, who dissolved the Assembly because of their protest against the Boston port bill, and the act setting June 1 as a day of fasting, and thereupon the burgesses betook themselves to the Raleigh Tavern and adopted resolutions against the stamped tea and everything else stamped.

In 1779 the General Assembly carried out its threat

¹A granite slab erected by patriotic women marks the site of the capitol and records these historic facts.

of 1748, and removed the seat of government to Richmond, leaving the capitol building for George Wythe to teach John Marshall law in, as Thomas Jefferson and others had been taught a few years before. And these were the men who were the state makers of a few years after, but who disagreed sadly about how it should be done, or rather as to how it had been done; John Marshall ultimately settling those questions in a series of famous decisions.

In 1832 the building got its final burning, and there being no occasion to rebuild it, the brick walls were later used for constructing a female academy, which after 1865, coming into the hands of a land company, was pulled down; and whither the bricks were removed the record does not say.¹

On the site where the old capitol stood, has been erected by the ladies of the Association for the Preservation of Virginia Antiquities a monument which tersely and lucidly records the historic events connected with the old capitol as I have narrated them.

Except the church, which has been written about in another chapter, the next most interesting of the old buildings of the eighteenth century standing in Williamsburg, was the Raleigh Tavern. Opposite page 232 of Dr. Tyler's most interesting book, "Williamsburg," is a picture of the old tavern, a wooden building erected in 1700 as one of the enterprises of the new city, a story and a half high, dormer windows in the hipped roof making the second story (eight on each side of the views presented), brick chimneys standing up high, and doors with triangular hoods, one in each front, and a few wooden steps up from the ground on each of the sides seen in the picture.

¹Williamsburg, 212. The foundation, cleared of debris, protected by cement and plainly defined, remains an interesting ruin and relic of by-gone days.

A leaden bust of Sir Walter Raleigh, for whom it was named, stood in a niche over the principal front door, and is still preserved.¹

The tavern was convenient for the burgesses, for it stood not far from the capitol on the north side of Duke of Gloucester street. The principal apartment was the famous Apollo room, which was the main room of the tavern. The picture of it is given on page 235 of "Williamsburg," where it is said: "It was well lit, having a deep fireplace on each side of which a door opened, with carved wainscoating beneath the windows and above the mantelpiece. Over the mantelpiece and near the corner was a Latin motto, 'Hilaritas Sapientiæ et bonæ vitæ proles.'"

Cooke² tells of the gathering of the planters there to enjoy the pleasures of the capital during the sessions of the General Assembly and pictures the street outside as "an animated spectacle of coaches-and-four, containing the 'nabobs' and the dames; of maidens in silk and lace, with high-heeled shoes and clocked stockings; of youngsters pacing on spirited horses, — and all these people are engaged in attending the assemblies at the palace, in dancing in the Apollo, in snatching the pleasure of the moment and enjoying life under a regime which seemed made for enjoyment." And all the stories tell how Jefferson, then a law student, wrote that he was as happy the night before as "dancing with Belinda in the Apollo could make him."

Among the many that came to the capital came George Washington, also as a member of the House of Burgesses. In the summer of 1758, while off on the second and successful expedition to Fort Duquesne, he was elected to represent Frederick County, after

¹Williamsburg, 1.

²History of Virginia, 398.

having been once, or possibly twice, defeated. He would not leave the army, even for a season, to see to his political prospects, and pending the canvass one of his most active supporters¹ writes him: "I am sorry to find that ye people and those whom I took to be yr friends, in a great measure change their sentiments, & now raise doubts of mres (measures) that seem to be clear with them before, this is ye consequence of yr back being turned." But in spite of these misgivings Washington was this time elected, receiving three hundred and nine out of seven hundred and ninety-five votes, there being four candidates and a plurality sufficient to elect, each voter having the privilege of voting for two candidates.²

About this time he had become engaged to be married to the widow Custis and on January 6, 1759, they were married, and a few months afterwards he was summoned to attend the session of the Assembly at Williamsburg. Mrs. Washington, of course, attended him, and though they had their own house and did not stay at the Raleigh Tavern, they were no doubt with the merry dancers in the Apollo, where he probably wore at times that blue coat with red silk lining and the parti-colored waistcoat which made him look so brave a figure at the recent wedding in the church in New Kent County.

Even though he was then not yet twenty-seven years of age, there was no more conspicuous figure at the capital than he, for he had saved Braddock's army after the disaster on the Monongahela, and later had gone back and helped to plant the British flag

¹Gabriel Jones, the lawyer, who left his own canvass in Augusta County to advance Washington's interests in Frederick.

²Virginia Historical Collections. Vol. XI, 117. Washington with his own hand copied the names of those who voted at this election, and arranged them in alphabetical order. Virginia Historical Magazine. Vol. VI, 162-173.

on the French Fort. But just then it was more his modesty than his valor that made men look at him, for in the gatherings at Williamsburg the former was a rarer virtue than the latter. It was when he came to this session of the General Assembly that occurred the well-known scene of his complete embarrassment when the speaker of the house presented to him the vote of thanks of the Assembly for his distinguished military services.

Only one other building of the city demands notice here, if indeed that be required when the story of it is so well told in greater narratives than this. The palace completes the quartet of buildings, church,¹ capitol and tavern, which pertain to the political and social life of Williamsburg.

In 1705, while Edward Nott was Governor, the General Assembly,² with a large preamble, enacted that there should be built "an house for the residence of the Governor of the colony and dominion," and allotted many acres, after a while amounting to three hundred and sixty, which were planted with lindens and other trees.³

The dimensions fixed by the act for the palace were fifty-four feet in length and forty-eight in width, from inside to inside, two stories high, with a vault, glass windows, a slate covered roof, with a suitable kitchen and stable and various outhouses, for all of which the sum of three thousand pounds was appropriated. But three thousand pounds did not suffice and more than twice that sum was expended on it before it was finished.

The Rev. Hugh Jones can always be relied on to give

¹See *ante*, Chapter V, of the College. See *post*, Chapter VII.

²Hening. Vol. III, 285.

³Cooke's History of Virginia, 397.

a glowing account of anything, and he speaks¹ of the palace as "a magnificent structure, built at the public expense, furnished and beautified with gates, fine gardens, offices, walks, a fine canal, orchards, etc., with a great number of the best arms, nicely posited by the ingenious contrivance of the most accomplished Col. Spotswood. This likewise has the ornamental addition of a good cupola or lantern, illuminating most of the town upon birth nights and other nights of occasional rejoicings."

It was not completed until after Governor Spotswood came in 1710. He was the first to occupy it, and to him was principally due the beautifying of the grounds. It was afterwards either wholly rebuilt or greatly added to,² for in the times of the later governors it had a front of seventy-four feet and a depth of sixty-eight. It was also flanked on either side by a small brick house, that on the right being the office of the Governor and that on the left the guard house.³

The interior accorded well with the exterior of the building and with the fine park that surrounded it, and on the walls of its great reception room hung the portraits of the King and Queen.⁴

Here was indeed a vice-royal court and there were few governors who did not make of the palace a place for sumptuous entertainments fit for the representatives of royalty to give to such loyal subjects as the Virginians were, until they were touched upon the spot vital to all true Englishmen.

Williamsburg had also a theatre, a source of amusement demanded by the gay throng who spent so much of their time there while they were away from home.

¹Howe's History and Antiquities, 323.

²Williamsburg, 216

³*Id.*, 217.

⁴*Id.* See the pictures, page 215.

It was no great building, although Spotswood was its patron. Later, the first building, erected in 1716, was sold, and in 1751 a new theatre was constructed near the capitol. Sometimes the young men of the college performed in it, and sometimes the ladies and gentlemen of the town and county had amateur plays there. Dr. Tyler accompanies his interesting account of this playhouse, and of the actors who trod the boards, with a facsimile advertisement from the Virginia Gazette, of the performance of the Merchant of Venice,¹ and there, too, was played King Richard the Third, and others of Shakespeare's plays, although the standard was by no means always so high.

Perhaps enough has been said about the town, but the account of the people, those, as he thought he saw them about 1722, given by the Rev. Hugh Jones, seems to be needed to complete our own vision of the place. He says:² "Here dwell several very good families, and more reside here at their own homes in public times. They live in the same neat manner, dress after the same modes, and behave themselves exactly as the gentry in London. Most families of any note have a coach, chariot, berlin or chaise. The number of artificers here is daily augmented, as are the convenient ordinaries or inns, for the accommodation of strangers. The servants here, as in other parts of the country, are English, Scotch, Irish, or negroes.

"The town is regularly laid out in lots or square portions, sufficient each for a house and garden, so that they don't build contiguous, whereby may be prevented the spreading danger of fire; and this also affords a free passage for the air, which is very grateful in violent hot weather.

¹Williamsburg, 227.

The Present State of Virginia. Howe, 323.

“Here, as in other parts, they build with brick, but most commonly with timber lined with ceiling, and cased with feather-edged plank, painted with white lead and oil, covered with shingles of cedar, &c., tarred over at first; with a passage generally through the middle of the house, for an air draft in summer. Thus the houses are lasting, dry and warm in winter, and cool in summer, especially if there be windows enough to draw the air. Thus they dwell comfortably, genteelly, pleasantly, and plentiful in their delightful, healthful, and, I hope, thriving *City of Williamsburg*.”

CHAPTER VII

EDUCATION

Although as late as 1671, Sir William Berkeley, the Governor, in answer to one of the questions¹ propounded to him from England as to what course was being taken in Virginia about instructing the people in the Christian religion, "and what provision is there made for the paying for your ministry," somewhat irrelevantly replied: "We have forty-eight parishes and our ministers are well paid, and by my consent should be better *if they would pray oftener and preach less*. . . . But, I thank God, *there are no free schools nor printing*, and I hope we shall not have these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and *printing* has divulged them, and libels against the best government. God keep us from both." Yet long before the date of the utterance of this remarkable sentiment, as far back as 1619, mention is made of the Governor having provided "sundry stuff for ye college," and even earlier there is a reference to contributions from the archbishops in England for the erection of a college in Virginia.² In 1654, too, an act of the assembly provided that "Indian servants be educated and brought up in the christian religion," and we know that christianizing the Indians was one of the chief reasons given for the adventure of 1607 to Virginia.

But no college was seriously undertaken until near the close of the century, which Berkeley helped to make famous in educational circles by the startling though not original views he took of the disadvantages of knowledge.

¹Hening. Vol. II, 517.

²First Republic in America, 279, 294.

But while the coming of these larger educational institutions tarried, teaching was by no means neglected in the colony.

Sir William Berkeley admits that at least as to instructing the people generally, there existed "the same course that is taken in England *out of town*: every man according to his ability instructing his children." It was a part of the obligation, too, of the master to have his apprentice instructed not merely in the trade he was to learn, but in at least reading, writing and arithmetic.

The wealthier classes had tutors for their boys and girls, or governesses for their girls. Scotch tutors, lay and clerical, seem to have been especially popular and Fithian says in his diary: "It has been the custom heretofore to have all their Tutors, and schoolmasters from Scotland, tho' they begin to be willing to employ their own countrymen."¹

While there were no free public schools in the sense in which they now so universally exist, yet at quite an early date gifts by will and deed were made for the education of the poor, and buildings, if not money, were furnished by the vestries for that purpose, and the benefit of them was extended to colored people, although perhaps not to slaves.²

The "old field schools" were well recognized aids to primary education, although they were very limited in their scope. It is said by Mr. Fiske³ that George Washington learned in one of them "to read, write and cipher," but he does not tell where he learned to spell.⁴ The Rev. Hugh Jones says⁵ that "as for edu-

¹Economic History of Virginia, 408.

²Old Virginia and Her Neighbors, 247.

³Ibid.

⁴Art. page 39.

⁵Present State of Virginia. Howe, 330.

cation, *several* are sent to England for it." They were hardly so few as to justify the use of the word "several," for the names of quite a number who went back to England to study at Oxford and Cambridge are given in the various published narratives.

One of our reporters, Sir John Randolph, studied law at Gray's Inn, London, and his son, Peyton Randolph, also a well-known lawyer and patriot, studied his profession at the Inner Temple, London. Both father and son had graduated at William and Mary College previous to going to London.

Gabriel Jones, known as the "Valley Lawyer," born within three miles of Williamsburg, was taken at a very early age to England, and there, when fifteen years old, was "apprenticed to a lawyer" in Middlesex. He returned to America in time to be appointed King's Attorney for Frederick County when he was nineteen years of age, and of Augusta County when he was twenty-one.¹ At that time these two counties embraced all there was of Virginia west of the Blue Ridge Mountains. This list might readily be greatly enlarged, if need be, to prove that it was quite common for the young men of the wealthier classes to be educated in England.

A sad account of all this is given by Mr. Lodge² who seemed to think that there was little or no means of education in colonial Virginia, and that what there was of it was bad,³ and that even of those sent to Europe, the young men brought back more of vice than of acquired education. And yet while this is spoken equally of the times just preceding the Revolution,

¹West Virginia Historical Magazine. Vol. II, 21.

²English Colonies in America, 73 *et seq.*

³See Mr. Fiske's contrast between educational conditions in Virginia and in New England, and the reasons for it. Old Virginia and Her Neighbors. Vol. II, 252.

the system in Virginia, good or bad, was equal to producing in that emergency a rather rare race of patriots and statesmen, who adapted themselves fairly well both to war and civil government.

Nevertheless, it must be confessed that the study of books was not universally the first or most ardent love of the Virginian. There were rivals in nature there which no books could fairly compete with, and the climate was a constant incentive, both in their occupations and amusements, that led much more to out-of-door life than conditions in New England did. The comparatively milder and much shorter winters of the more southern colony did not suggest near so strongly the fire, the lamp, and the book. But all of education is not from between the lids of printed books, and it has perhaps been as well for the country on the whole that its founders were taught in both schools.

The private libraries, lists of the books in which appear so often in the recorded inventories of estates, were the source as they were the evidence of a large degree of culture.

Mr. Fithian, several times before quoted from, says in a letter to Rev. Enoch Green,¹ that Col. Carter had an "overgrown library of books" of which he allowed him the use. These consisted of law books, Latin and Greek classics, a large number of books on Divinity, but chiefly by writers of the Established Church; almost all the works of Locke, Addison, Young, Pope, Swift, Dryden, etc., "in short Sir, to speak moderately, he has more than eight times your number." As to Col. Carter's ability to appreciate such a possession, Mr. Fithian says of him: "He seems to be a fine scholar, even in classical learning, and is remarkable in Eng-

¹Of Deerfield, New Jersey.

lish grammar, and notwithstanding his work, which in general seems to countenance indulgence to children, both himself and Mrs. Carter have a manner of instructing and dealing with children far superior, *I may say it in confidence*, to any I have ever seen in any place, or in any family."

The inventory of the library of Dabney Carr,¹ who died in 1773, besides a considerable collection of law books, religious books and a large number of books of sermons, shows among others a number of books of history, ten volumes of Shakespeare's works, Tristram Shandy, Stern's Sentimental Journey, Locke's Essays, Thompson's Seasons, various poetical works, nearly all the Latin books and many of the Greek books used at school, a number of French books, and other books of a miscellaneous character.

The will of John Carter,² "the immigrant" and ancestor of Col. Carter of Normini Hall, speaks of, but does not give, the names of his books, and leaves one sixth part of them to his son Robert, with the rather singular provision: "My son Robert, in his minority, is to be well educated for the use of his estate, and he is to have a man or youth servant bought³ for him that hath been brought up in the Latin school, and that he (the servant) shall constantly tend upon him, not only to teach him his books, either in English or Latin, according to his capacity (for my will is that he shall learn both Latin and English and to write) and also to preserve him from harm and doing evil."

William Fitzhugh, whose granddaughter (the daugh-

¹Virginia Historical Magazine. Vol. II, 225.

²Dated January 3, 1669. Virginia Historical Magazine. Vol. II, 235.

³Presumably an indentured servant.

ter of his eldest son, William) was the wife of our reporter, Edward Barradall, left his "study of books" to be divided between his sons William and Henry.¹

The inventory of the estate of Henry Fitzhugh, son of the last named Henry, and brother² of Barradall's wife, shows "books, per a catalogue (not given), valued at £258.7.9."³

The inventory of the estate of Dr. John Henry of Middlesex County includes seventy-seven books, "Latin, English, Medical, religious, law,⁴ etc."

A letter from Mr. William Fitzhugh (the elder) before referred to, dated July 10, 1690,⁵ speaks of the various books needed for the education of one of his sons, and says to his correspondent: "This year I was designed to have sent home⁶ my eldest son⁷ to school there, and did intend to request of your care of him & kindness to him but accidentally meeting with a french minister, a sober, learned & discreet Gentleman, whom I persuaded to board & Tutor him, which he hath undertaken, in whose family there is nothing but french spoken which by a continual converse will make him perfect in that tongue and he takes a great deal of pains & care to teach him latin, etc."

The inventory of the estate of Robert Berkeley,⁸ who died February 4, 1734, gives his books by name and number of volumes, and fills three printed pages in double columns. They are books of history, religion,

¹Virginia Historical Magazine. Vol. II, 277.

²*Ibid.* Vol. II, 278.

³Writing July 21, 1698, to a Mr. Hayward in England, Mr. Fitzhugh orders him "punctually and without fail to send me" the second and third parts of Rushworth's Collections, Burnett's Theory of the Earth, all the works of the author of the Whole Duty of Man, Bacon's Remains, Cotton's Records of the Town, The secret history of "King Chas. the 2nd & King James the 2nd," a large fair printed Bible, a large Common Prayer book, and many other books.

⁴Virginia Historical Magazine. Vol. III, 4.

⁵*Ibid.* 9.

⁶England.

⁷He was afterwards the father-in-law of Edward Barradall.

⁸Virginia Historical Magazine. Vol. III, 388.

philosophy, natural history, law, mathematics, astronomy, many of the classics, Latin, Greek and French books, The Adventures of Telemachus, Paradise Lost, Æsop's Fables and, among others, "The fair Circasion," "The curious maid, a Tail," and "Ye victory of Cupid."

Arthur Smith of Isle of Wight County, 1645,¹ leaves to one of his sons "all my Books," and charges upon his executors, "also the bringing up of my children in the fear of God and to learn to read and write." The will of George Yeo of Elizabeth City County, dated March 15, 1742, gives to his cousin John Seldon, all his law books, some of his miscellaneous books, including, as all of them seemed to do, "The whole Duty of Man," and then divided the rest of his books among others of his kindred.²

But further enumeration would be tedious. It is enough to say that the records are full of wills and inventories showing the quite extensive and valuable libraries owned by citizens of Virginia in colonial times. On page 299 of Vol. VII, Virginia Historical Magazine, is a partial list of the names of such persons, one hundred and nineteen in number, giving in many cases the value and numbers of their books. The list is accompanied by the statement that "all students of Virginia history are assured that there were in the colony a number of libraries, which for that period, were quite large and valuable," and comment is made upon the fact that "even a friendly writer, like Mr. Fiske," should think that these were exceptional cases and that this love of books and reading were confined to some of the wealthiest and best educated class.

The list does not include the large libraries men-

¹Virginia Historical Magazine. Vol. VII, 115

²*Id.*, 194.

tioned by Mr. Fiske,¹ such as that of William Byrd of Westover, containing three thousand six hundred and twenty-five volumes; and of Richard Lee, of three hundred titles. Libraries of the size of that at Westover were, of course, exceptional, but not so that of Richard Lee, with three hundred titles. It must be remembered too that these were all dwellers in the country. Would rural libraries in the other colonies make a better showing?

Surely the conclusions recorded by Mr. Lodge are contradicted by the record. The wills and letters of these men do not indicate that they did, or that their sons, save in exceptional cases, could have brought back more of vice than learning from England. The sons indeed were many of those who figured conspicuously before and during the revolutionary period.

But if the list of libraries already given were not proof enough of the almost universality of books (often not reaching the dignity of *libraries*) even among the less conspicuous people of the colony, the evidence of it is furnished by a much larger list, covering more than fifteen pages (389 to 405) of Vol. X of the Virginia Historical Magazine.² Nor does the list stop with these, for numerous other instances of the possession and use of books is given in subsequent numbers of the same magazine.

The inventory of the estate of Thomas Lord Fairfax,³ otherwise also a very interesting document, has among some more serious books a number not common in Virginia libraries, such as "Tom Jones," "Joseph Andrews," "Adventures of a Valet," "David Simple," "Peregrine Pickle," etc.

¹Old Virginia and Her Neighbors. Vol. II, 244.

²Taken largely from William and Mary Quarterly, Vol. VIII, and from Lower Norfolk County, Virginia Antiquary, Vols. I, II and III.

³Virginia Historical Magazine. Vol. VIII, 12.

Of newspapers there was ever a scarcity in the colonies. Indeed, there were comparatively few of them at that time in Europe and very few in any of the colonies. Newspapers have always been the product of cities or of the larger towns. There were none of either in Colonial Virginia. The first newspaper published in Virginia made its appearance on August 6, 1736, under the name of the Virginia Gazette.

As early as 1704 a newspaper was printed in Boston and a second paper was issued in 1719. Not until 1725 was a newspaper published in New York. So after all, Virginia was not so far behind in this kind of enterprise. Indeed, as early as 1682, an attempt was made to establish a printing press, for Berkeley had then only been dead five years, although he had ceased to be Governor about a year before his death.

The Virginia Gazette is described¹ as "a small dingy sheet, containing a few items of foreign news; the advertisements of the Williamsburg shop-keepers; notices of the arrival and departure of ships; a few chance particulars relating to persons or events in the colony; and poetical effusions celebrating the charms of Myrtilla, Florella, or other belles of the period." The paper at the beginning of its publication was in size about twelve inches by six, and was published in Williamsburg by William Parks at the price of fifteen shillings per annum. After stating that newspapers had been established elsewhere in the colonies as well as in Europe, the publisher says in his introduction: "From these examples, the encouragement of several gentlemen, and the prospect I have of success in this *ancient and best settled colony*, Virginia, I am induced

¹Cooke's History of Virginia, 330. A very incomplete set, with no numbers as early as 1743, is in the Virginia State Library. A few copies are in the Library of the Virginia Historical Society.

Howe's History and Antiquities of Virginia, 331.

to set forth weekly newspapers here, — not doubting to meet with as good encouragement as others, or at least as may enable me to carry them on."

From the same source we learn that it was this publisher, William Parks, who in 1729 printed at Williamsburg, Stith's History of Virginia and the Laws of Virginia.¹ Howe states that the paper was under the influence of the government, and when Parks died in 1750, it was discontinued.

In February, 1751, the paper was revived and carried on by William Hunter. He died in 1761 and it was then enlarged and published by Joseph Royle, after whose death it was carried on by Purdie and Dixon,² and for several years by Purdie alone. The last issues of the paper seem to have been in 1778, when Dixon and Hunter were the publishers. Mr. Jefferson is reported³ as giving this account of this early newspaper enterprise: "Till the beginning of our revolutionary disputes we had but one press; and that having the whole business of the government, and no competition for public favor, nothing disagreeable to the governor could find its way into it. We procured Rind⁴ to come from Maryland to publish a free paper." This resulted, in May, 1766, in the issue of a second paper, also entitled "The Virginia Gazette," which, it was announced, was "published by authority, open to all parties, but influenced by none." The phrase, "published by authority," was omitted at the end of the first year, and William Rind dying in August, 1773, the paper was continued by his widow, and at her death,

¹The Acts of the General Assembly.

²See Virginia Historical Magazine, Vol. IX, 411, 412, for an account of its various numbers, some of which are missing and some inaccurately numbered, with the names of the different publishers and the dates on which they published the paper.

³Thomas' History of Printing. Howe, 321.

⁴Virginia Historical Magazine. Vol. IX, 412. Date, March 3, 1768.

by John Pinkney. Still another "Virginia Gazette" was commenced in 1775 at Williamsburg and continued for several years under Clarkson and Davis.

This newspaper seems throughout to have been but a poor affair, and although useful, no doubt, to the politicians of the day, could have contributed but little to the general cause of education. At this day the newspaper can not be universally claimed to be the model dispenser of truth, but it may be some comfort to the average editor or manager to learn from such a source as Mr. Jefferson how newspapers stood, in his opinion at least, in 1807. He writes:¹ "It is a melancholy truth that a suppression of the Press could not more completely deprive the nation of its benefits than is done by its abandoned prostitution to falsehood. Nothing can be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle. . . . I will add that the man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehood and errors."

Strange that it was not far from the same period that John Marshall, the consistent opponent of Jefferson, referring to attacks made by Jefferson's friends, and it was supposed at Jefferson's instigation, in the public press, upon certain decisions of the Supreme Court of the United States, wrote to a friend: "There is on this subject no such thing as a free press in Virginia, and of consequence the calumnies and misrepresentations of this gentleman will remain uncontradicted and will be believed to be true."

The issues of the Virginia Gazette contain indeed but little of interest at any time and less now to the

¹Thomas' Life and Writings of Jefferson, 320.

antiquarian of the present day. There is mention of the crops, of social functions among the gentry, marriages, and obituary notices, both often accompanied by poetic effusions, and there were some trade advertisements which suggest the customs of the day in that respect.

Of more interest is an account in the issue of November 12, 1736, of the annual visit of the president, masters and students of William and Mary College to the Governor at the palace, to present to him the customary copies of Latin verses. The president delivered his verses to the Governor and two of the students, sixty being present on this occasion, spoke theirs.

In another issue of the same year is a notice of a performance at the theatre, by the college students, of the Tragedy of Cato, and on three evenings of one week, by gentlemen and ladies of the county, of "The Busy Body," "The Recruiting Officer" and the "Beaux Stratagem."

An advertisement appears in 1739, of Edward Morris, "Breeches-Maker and Glover," who sells buckskin breeches and "buckskin gloves with high tops." Nor was the paper free of the item of interest that still attracts in the present country weekly, the mention of the biggest hog of the season.¹

But the most marked educational movement in the history of colonial Virginia, was the organization and maintenance of William and Mary College. Only a brief account of it, however, is appropriate to this writing.

Dr. Blair, the Commissary, is the admitted founder of the college. He came to Virginia as a missionary in 1685, when he was twenty-nine years old, and at

¹Howe's History and Antiquities, 331, 332.

once took a deep interest in advancing both religion and education in the colony. William and Mary were King and Queen in England and Francis Nicholson was Governor in Virginia when in 1691 Blair was sent back to England to get a charter, and to solicit royal support for the scheme. In 1692 the charter was gotten, and Blair was named as the first president. Harvard dates from about 1638 and is therefore the senior of William and Mary by more than forty years, but William and Mary stands next in seniority among American colleges.

Considering their subsequent and very active enmity, it is rather strange that Governor Nicholson should have been the Commissary's most valuable assistant in getting up the college. Indeed, the Governor regarded himself as the founder and Dr. Blair as the assistant.¹ But whatever may have been Governor Nicholson's demerits in other particulars, he deserves a very large part of the credit which he claimed for this most meritorious enterprise.

Dr. Blair, then having been appointed Commissary of the colony and therefore the head of the clergy, at a convention held in Jamestown in July, 1690, laid before it in a paper prepared for the purpose, his plan for a college, the object of which was for the education of the white youth of Virginia, the training of ministers for the church, and the conversion of the Indians. The scheme was received with much favor and an appeal to the merchants of London trading in Virginia secured at once a pledge of three thousand pounds. Dr. Blair's visit to England was equally successful, and not only the bishops and other clergy, but the

¹The bibliography on the subject of the founding of the college is collected on pages 155, 156, Vol. VII, Virginia Historical Magazine. To the list must be added Dr. L. G. Tyler's narrative in "Williamsburg," 110-204.

King and Queen promised their favor for the enterprise. It took a year, however, to realize anything from these promises, but at last at a meeting of the privy council, at which Queen Mary, in the absence of the King, presided, a considerable fund in the way of income from quit rents in Virginia, taxes on tobacco exported, profits of the office of surveyor general, and large tracts of land, held on the condition of two copies of Latin verses to be delivered to the Governor or Lieutenant Governor of Virginia on the 5th day of November in each year,¹ were appropriated for the building and endowment of the college. Other funds, too, were secured by the energy and shrewdness of the commissary, so that when the long delayed charter arrived, and the various red tape requirements had been complied with, the trustees appointed, the location determined on and the land (330 acres) bought, all of which was accomplished by the year 1694, the business of putting up the college buildings was begun. Sir Christopher Wren was the architect, the brick were made nearby, and by 1697 two sides of the contemplated rectangle were completed. The school had in fact been started on a small scale in 1694, but it was not until 1698 that the college buildings were put into use. Meanwhile troubles of all sorts had attended the enterprise. Dr. Blair was a man of war, and when that is the case there is no lack of other warriors. Governors seem to have been the commissary's favorite antagonists, as if he did not regard smaller game as any sort of sport. But though he triumphed in the end, he and his family were subjected to much humiliation and even to personal insults.

Nicholson who had been sent away to serve as deputy governor in Maryland, and had made himself unpleasant

¹*Ante* page 148.

there, came back in 1698, succeeding Andrews, who had been in constant conflict with Dr. Blair, and had greatly discouraged the college enterprise. Great things were expected of Nicholson, who had been a warm friend of the college and a liberal subscriber to it at the start, and they were not disappointed. It was he who in 1699 was most influential in securing the removal of the capital to Williamsburg, and that was of much importance to the success of the college. So the partly constructed buildings were put in use and masters and students were gathered together, and by 1700 they had progressed so far that a very successful commencement was held. But there was no fence high enough to separate Blair and Nicholson. The church and the courthouse stood physically between the college and the palace, but neither religion nor law was a sufficient barrier to separate these eager combatants. So a merry war waged hotly between this deputy governor and this deputy bishop. Bad words not fit for a governor's mouth were spoken to Blair, but the Governor claimed to have much provocation and to have been justified in speaking "with some warmth,"¹ writing in his defense that Blair's answer to him was "ye odious compillation of a bitter invective & gross Callumnies" and "every Body Knows yt a Gal'd horse will winch."²

As has been already told,³ the Commissary at last found the Governor's vulnerable point neither in law or war, but in love, and this was his quick undoing.

¹Virginia Historical Magazine. Vol. VII, 387.

²Virginia Historical Magazine, Vol. IX, 18. In the possession of the Virginia Historical Society is a new volume entitled "Papers concerning a difference between Governor Nicholson and some of his council: also concerning the college of William and Mary, copied from documents in the archives of the State of New York, Vol. LI." This manuscript contains a very full account of the controversy between the Governor and the Commissary. The book is printed in the Virginia Historical Magazine, commencing on page 153 of Vol. VII, and continued at intervals through that volume and volumes VIII and IX.

³Ante page 100.

Although nearly all the clergy, and among them the Rev. Solomon Wheatley, who had so much trouble and had acted so diplomatically about the matter of the advowson, were on the Governor's side and signed a strong paper¹ in which they made the "most Solemn Protestation that we do Dissent from and Disown those unfair Clandestine measures wch his Reverence has taken to accuse your Excellcy without our consent or Knowledge;" yet neither the combined clergy nor the laity as represented by the Governor and his friends, with even a majority of the burgesses, could meet the forces of the Commissary, and at last he won comparative peace, which indeed he probably did not altogether want, but needed perhaps for the success of the college. But it was not until Dr. Blair had disposed also of the next Governor, Col. Spotswood, that permanent peace was established, for Governors Drysdale and Gooch, knowing the qualities of Blair and the fate of their predecessors, were wise in their day and generation and never broke with the Commissary.

But now came a great calamity to the college. Fire broke out in the building about ten o'clock at night on October 29, 1705, and while the Governor and all the people of the town and many visitors, for it was said to be "a public time," looked on helpless to prevent it, the building, put up at so much expense and trouble, burned down.

But Dr. Blair had fought more foes than fire, although such in another sense was supposed to be his chief vocation in life, so with characteristic energy he set about securing funds to rebuild. He procured more taxes from the burgesses, gave up his own salary of one hundred and fifty pounds as president, got a

¹Virginia Historical Magazine. Vol. VIII, 47.

gift of one thousand pounds from Queen Anne, and Governor Spotswood coming into office about that time and being of the kind that made things move, it was not long before the walls went up again and the college building was in better shape than before.

This all happened about the year 1711, and after that there was greater progress and more usefulness in the college than there had been before the fire. By degrees the buildings were added to, all being of brick. It soon had a small library which gradually was increased until there were more than four thousand volumes.

In the years to come the college had its ups and downs, but prospered in the main, and besides the academic department there were established schools of divinity and of law. As has been noted before,¹ Dr. Blair died on April 18, 1743, and was buried at Jamestown, where fragments of the tombstones of himself and his wife, placed there in 1752, may still be seen.² Governor Gooch, writing to the Bishop of London of Dr. Blair's death, says that he "lived ten days after the doctor had declared that he could not live ten hours."³

Many distinguished Virginians were educated or studied law at this college and among those of national reputation were Jefferson, Monroe, Marshall, Edmund Randolph, Gen. Winfield Scott, John J. Crittenden and John Tyler. Judge George Wythe was for some years the professor of law, only leaving there for Richmond in 1791, and John Marshall was his most distinguished student.

¹*Ante* page 98.

²Williamsburg, 142.

³*Id.*

CHAPTER VIII

THE LAW AND THE LAWYERS

In an earlier part of this Introduction we have seen that with the first ships that brought the settlers to Jamestown in 1607, came the charter requirements and instructions that the colony was to be governed according to the laws of England; and while almost absolute powers in other respects were given to the council, it was denied jurisdiction in matters affecting life or limb. In the chapter on government,¹ also, we have considered, so far as the subject is appropriate to this writing, the charter of 1606 and the instructions to the adventurers of 1607, which were to govern them in the far away land to which they were going. The powers given to the council to make laws and to rule with or without them, and its oligarchical character both in theory and in practice, with the one important reservation of the right of English liberty to the adventurers and their children and to all future dwellers in the new land, the change of the law-making power to the Governor alone, and then the abolition of this possibly necessary but altogether despotic system and its exchange for a partly representative government with its growth and adaptation to the wants of the people, and the relations of Governor, council and elected burgesses to each other, have all been fully considered. And we have discussed, too, not merely the legislative but the judicial functions of the council and the General Assembly, of which latter the council was an important part, far enough to give us a fair outline of the structure of the government of the

¹Chapter IV.

colony on the plan of which, with sundry changes caused principally by the transmission from a monarchical to a republican condition, our government of today was formed.

Then, too, we have noted the disappearance of the intervening authority of the London Company, and the establishment of direct relations between Virginia government and King and Parliament, intended by the managers of the plan to be almost entirely a relation to the King, but which, by a series of happy accidents, without much personal responsibility upon any one of the conflicting interests, fell out at last to the real advantage of the colonists, and to the increase and firmer planting of local self-government in the people along the banks of the four great rivers.

These things are recalled to the reader just now because by having them in mind he will better appreciate the laws made under such changing conditions, and of which it is intended in this chapter to give history enough to serve the purpose to which this introduction is devoted.

As has been mentioned, the office of Governor was made by the Charter of 1609, and Sir Thomas Gates, in the absence of Lord De La Warre, whom we shall hereafter call Delaware, who was to be the real governor, became for the time the Governor under a commission especially appointing him to that place. Delayed by shipwreck off the coast of the Bermudas, for they still followed the longer southern route, Gates did not reach Virginia until the spring of 1610. He came as the first lawgiver, and he published his enactments by writing them out "fair," and setting them up on a post in the church, so that all could see them, and those who were able to read could read them.¹

¹The First Republic in America, 126.

Draco had, many years before, performed a similar service for the Athenians, although it is said of him as of a certain Roman lawmaker,¹ that he purposely posted them so high that the people could not read them. Each of these lawmakers, Draco and Gates, had the distinction of being the author of the first written laws for their respective countries, but with different results to the individuals themselves. Draco, because of his laws, was after some years exiled by his countrymen. Gates, as he had told the people would probably happen, a few days after the publication of his code, in rather a dramatic way for such surroundings, embarked with all his countrymen and their effects upon three ships, and sailed away, leaving the land and the laws he had prescribed for its government, all to themselves.

But the retreating expedition had not proceeded far, when at Mulberry Island near the mouth of the river, they met the messengers of Delaware, who with ships, people and supplies, had just arrived off Cape Henry; and upon being joined by the new Governor and his little fleet, they all sailed back to Jamestown and resumed where they had left off a few days before. It was a narrow escape from complete abandonment, for if Gates had been but a day sooner he might have reached the open waters of the ocean, with the probabilities much against meeting the expedition of Lord Delaware.²

The laws of Gates had probably been left posted in the church. At any rate, Delaware read and ap-

¹Caligula. "He both posted them high and wrote them fine." *Lives of the Cæsars*. Suetonius. Chapter XLI.

²Cooke speaks of the return to Jamestown as being on Sunday, June 10, 1610 (*History of Virginia*, 83), but Brown (*First Republic in America*, 125) says that Delaware cast anchor at night, on June 16, at Cape Henry; reached "Cape Comfort" the next night; sent a messenger to Gates, June 17; met him at Mulberry Island, June 18, and reached Jamestown Sunday, June 20.

proved them, and directed that they should remain in full force and virtue over the much enlarged body of citizens which his three ships added to the company of Gates which had been arrested in its flight.

So the laws remained, and, no doubt, continued to be read after and before and perhaps at or between the times of service, which were many, on the post in the church, though probably some more convenient place was found for them while Delaware was having the pretty pews and pulpit and the broad windows put in the building, now known to exact historians as the third church.¹

Now comes again the comparison of these laws of Gates and Dale, who came after, with those of Draco, who had played the same role with the Athenian people. History has set up the Draconian code as the severest set of laws ever imposed on any body of the human race, but it is doubtful if they exceeded either in cruelty, or *apparently* in folly, the laws under which this band of English born people existed from 1610 to 1619.

Death by this code was the customary, and less than that the unusual, punishment for a long list of crimes, defined with much particularity,—from stealing grapes to staying away from church three times in succession.² It is a travesty to speak of this as *law*, unless that be *law* which in time of peace is administered at the drum's head. Captains and lieutenants were the judges, and armed soldiers were the officers of court, while the provost marshal was the "gaoler," if ever a jail was needed for the very short time that elapsed between conviction and execution.

Whichever of the Sir Thomases, Gates or Dale,

¹Bruton Church Restored, 36.

²Justice in Colonial Virginia, 14.

deserved it most, Dale got the larger part of the bad reputation for it all; but the truth indeed is that milder manners would have lost the day. There were desperate characters enough in the small body of men, women and children huddled together at the little town to have taken the rule from weaker hands and played havoc with these embryo planters of free government, if Dale had been content with simply posting his laws in the church or elsewhere, and had failed to give them the needed force with the point of his sword. Had he not been the forceful man he was, he too, like Gates, would soon have been obliged to take to his ships.

So after all, with his strange mixture of zeal for the saving of souls and the cruel infliction of punishment of bodies, his capacity for intrigue and conscientious regard for duty, his harsh and pitiless sternness and mild and courteous manners, in spite of his so-called laws, Dale has come down the centuries with the judgment of history,¹ that he understood human nature and the way to govern it, and was, on the whole, a wise, as he was, under the adverse circumstances, a quite successful ruler.

But now comes a great change, and one would think a rather daring experiment, which, indeed, resulted largely from the plan of politics in England.

In 1619 came the new charter, the real beginning of constitutional law in America, with an assembly to be elected by the people and the beneficent Yeardley as Governor, to put the new plan in force and to start it in working order. And here begins the actual reign of law, though *order* under Dale had preceded it, and it becomes interesting to know what now was the real support and force by which this new system was successfully

¹Cooke's History of Virginia, 107.

planted and maintained. For in spite of the early admonition to that end, the colony surely had not during the twelve years of its existence, and especially since 1610, been governed according to the laws and institutions of England.

We have already seen that the courts for the administration of justice were (after a time) the justices, the County Court, and the General Court, but none of them at first, under those names. Later we shall read more particularly of the respective jurisdictions of these tribunals, but now we are concerned in knowing under what sort of laws these courts had to see to the doing of justice, and by what sort of rule it had to be measured.

The laws and institutions of England were to be also those of the colony. But in the very nature of things they could not be so without much variance, and the common sense of the people on both sides of the ocean recognized and approved this in the application of the rule.

The Common Law and the principles of Equity, as they prevailed in England, were equally the rule in the colony. The King and Parliament were paramount in Virginia as well as in England, and therefore, Acts of Parliament intended for the colony were the law of the colony, acts of its General Assembly to the contrary notwithstanding.

William Fitzhugh,¹ though a merchant, planter and shipper, was also a lawyer by profession, born and educated as a lawyer in England, and actively practicing his profession in Virginia; and he was reckoned there a good lawyer. In a very elaborate argument² on the subject of the authority of English law in Vir-

¹He was the grandfather of Barradall's wife.

²Virginia Magazine. Vol. I, 260.

ginia in cases of conflict, among the numerous reasons which he gives for holding that "the laws and statutes of England are binding here," he cites the fact that the "preamble to the body of our printed Acts doth declare that what laws we make must not be repugnant to the laws of England." He refers also to "his Majesty's instructions from time to time," the first of which, drawn up by James I in 1606, directs that the laws of the colony "be in substance consistent with the laws of England or the equity hereof."¹ But Col. Fitzhugh disputes the contention "that the Laws and Statutes of England were not binding to us here, except such statutes wherein we are particularly named."

The opinion, however, of Sir William Jones, attorney-general for Virginia, and which bears the date of September 22, 1681, ("7ber² 22d 1681 ") says:³ "For though I do agree, that an act of Parliament made in England doth bind Virginia or any other of the English Plantations when they are expressly named, yet I do conceive a new Law or Statute made in England, not naming Virginia or any other Plantation, shall not take effect in Virginia or the other Plantations, till received by the General Assembly or others who have the Legislative Power in Virginia or such other Plantation, and this upon a double Reason. — 1st, Because the Parliament of England when they make a law without naming more Places than England as the Extent to which it shall relate, are not to be presumed to have Consideration of the particular Circumstances and Condition of the Plantations, especially considering no member came from thence to the Parliament of England. 2ndly, Because the

¹I. Hening, 74.

²Septem(7)ber — a queer conceit.

³Barradall's manuscript. R. 1.

Plantations have their own Representatives, and though the Parliament of England hath a superior Power when they think fit in express words, to execute it; yet it shall not be presumed, that they execute that extraordinary Power, where they do not in express words declare it. And as this hath been anciently resolved in many Cases with Relation to Ireland, So I think the same Reasons hold with Relation to the Plantations, and if it should be otherwise then great inconveniency amongst others would follow, That a Law made in England (which relates, if no time be expressed, to the first Day of the Parliament, and where a Time is set it shall take effect, it is commonly so short a Time as no notice can arrive to the Plantation before it begins to take effect) should bind the Plantations, who have not any ready means to know it for a long Time after it is passed and so then should be bound by Law of which they are, or may be reasonably supposed necessarily & invariably ignorant."

A note to this opinion states that it was shown "to all the then judges of England, who declared the same to be the Law."

The case in which this opinion was given was of a will made in Virginia, devising lands in England, but with only two witnesses, whereas the act of Parliament of 1677 required three witnesses, and it is presumed, although it is not so distinctly stated, that the English act changing the number of witnesses to a will to three had not yet been officially published or filed in Virginia, where the will was executed, and therefore the opinion of the attorney-general sustained the validity of the will.

This opinion is based also upon the generally entertained and accepted view that while Virginia was bound by the laws, customs and institutions of England

in a general way, yet that these in their application to the affairs of the colonial people had necessarily to be modified to suit the very different conditions existing in the colony from those in the motherland, and hence, to use the language of a facile writer,¹ "they had to return to their infancy, and in some instances to pass through stages of growth in the new world similar to those through which they had already gone in the old. . . . Only those parts of the old conditions that were suited to the new conditions survived and became a permanent part of the colonial system of government."

The Common Law prevailed in Virginia, although it was not formally adopted here until the revisal of 1660-61,² just as it did in England, except so far as it was changed by acts of the General Assembly, and all the ancient forms of procedure in actions at law were followed with a degree of technical exactness and precision which the writer thinks has not prevailed here, within at least the last fifty years, independent of statutory changes.

The writ of *habeas corpus*, however, as we have already seen,³ did not exist in Virginia until the time of Spotswood, in the year 1710. The principles of equity too, as they prevailed in the English courts, likewise governed the courts of the colony, and the forms of proceedings in chancery as they were known to the English lawyers, were followed by the members of the Virginia bar, except that in the Monthly—afterwards called the County—Courts there was but little form of any kind either in the pleadings or in the orders of the courts, as, indeed, was true of that court through its whole history until, in its declining days, its whole

¹Chitwood. Justice in Colonial Virginia, 1.

²II, Henning, IV.

³*Ante* page 102.

object and purposes (a necessary sacrifice in Virginia¹) were perverted by changing the ancient system of a court presided over by justices of the peace, for persons required to be "learned in the law."

Primogeniture with entails, very constantly docked on application by the General Assembly, and the laws of descent generally, of England, were followed in the colony. The seating of lands by patents issued on condition of building, cultivating, etc., was provided by law and was never abused in practice.² The forms and legal requirements of wills were, for the most part, those of the old country, but the places of probate, which for many years was confined to Jamestown, were in 1645³ fixed "at the County Courts where such person or persons did reside or inhabit," and orders for the administration of estates were to be made by the same courts.⁴

The differences between the legislation of the present day and that of colonial times consist in the change of subjects which have come into existence or have so much changed their natures since that day, the extremely paternalistic character and primitive and informal expressions of legislation, especially of the earlier colonial period, and the necessary differences between laws enacted under a monarchy and those enacted by the same people under a republican form of government. Then, of course, the intolerant spirit of that age and the seeming thought that sin and every other evil could be cured or prevented by law, gave a different tone to legislation from that of more modern times. Beyond these differences the course of legislation in the seventeenth and eighteenth centuries did

¹By reason of negro and other ignorant and general suffrage.

²The Writings of William Byrd. Bassel, 180.

³I, Hening, 302.

⁴*Id.*, 446.

not vary much from that in the nineteenth and twentieth.

But these points of dissimilarity were not chiefly due to the people, the place, or to their colonial conditions. Severity, intolerance, and the theory of this legislative panacea, were as much characteristic of Old and New England as they were of Virginia, and there seems to be even less of the influence of superstition in the last named, than in the two former communities.

Severe laws fixing the penalties for the commission of crimes long outlived the time of Gates and Dale. Murder, rape, arson and violent robbery were punished with death; while the pillory, stocks, the whipping post and the ducking stool were kept in readiness, and plentifully used, for minor offences.¹

In civil legislation, statutes of limitation,—the regulation of domestic service, provisions for preserving what even in that time were regarded as “ancient records,” laws affecting the sessions of the courts, the right of appeal, the modes of procedure, attachments, costs, grand juries, petit juries, returns of process, set-off to debts, confessions of judgments, fraudulent conveyances, executions, pleas in the courts, liens upon property, the rules of practice, the competency of witnesses, the fees of court officers, the appropriation of the public revenues, the laws of suffrage, acts affecting insolvent debtors, the celebration of marriages (even to the hour of the day), the militia, the control of negroes, slaves, (under certain conditions making them a part of the real estate,) parishes and their expenses, taxes, prisoners, representation in the General Assembly, sheep, silk, regulating tavern fees, the exportation of skins, hides and furs, hog

¹Old Virginia and Her Neighbors. Vol. II, 265.

stealing, the legal tender for debts, surveys of land, swearing oaths, estrays, tobacco, mills, wolves, the exportation of wool, bastards, the registration of voters, coins and coinage, the making of contracts, rum, salt, warrants of justices of the peace, trespasses, weights and measures, tolls, slanders, tippling houses, patents, orphans, mulberry trees, pilots, naturalization laws, ordinances, manufactures, law books, navigation laws, highways, the cultivation of flax, making iron, Indians, the induction of ministers, courthouses, the manufacture of linen, woman suffrage, customs, waifs, whipping posts, stocks, Quakers, physicians, mulattoes, lawyers, hunting, felonies, liquors, lands, fences, escheats, deer, convicts, burials,—were of the many and variant subjects, taken at random from the statutes, which occupied the time and thoughts of the members of the General Assembly.¹

In 1694 there was prepared, and subsequently found among the "Ludwell Papers,"² and now published in the Virginia Magazine, commencing on page 273 of Vol. IX and continued in that and subsequent volumes, a manuscript of one hundred and twelve pages, entitled "An Alphabetical Abridgment of the Laws of Virginia." . . . "God Save Ye Queen." This gives, first, a list of the acts repealed, "expired or disused," up to the date of 1694. It then gives alphabetically, commencing with "Accounts," a list of the subjects of laws in force, and under each head various subdivisions of the subjects, which to a lawyer of that day and later must have been of very great value. Such a tabulation of the laws, could it have been printed, would have been all the more useful because of the defective character of the collections of the statutes,

¹See the various volumes of Henning's Statutes at Large.

²Prepared, no doubt, by Philip Ludwell.

printed in the latter part of the seventeenth and the beginning of the eighteenth centuries, and for the reason that not until the year 1733¹ was an edition of the laws of Virginia printed in the colony. There was an edition printed in London, it is supposed between 1684 and 1687,² for no date is give on the title page; but in the early years of the colony it had been the practice when a law required amendment, to re-enact it with the amendment introduced into the body of it. Then at each new session of the General Assembly, it would repeal all the former laws and re-enact such of them as were needed, either as they stood, or with such amendments as the General Assembly might see fit.

So, says Hening,³ "while they existed only in manuscript, and were promulgated by being publicly read, this mode was attended with peculiar advantages; for the people at once heard the *whole law* on a subject, without being compelled to ask the advice of counsel, or to resort to the clerk's office for a reference to the only copy extant in the country." This supposed advantage presupposes, however, a disposition to listen and heed, and, further, a capacity to understand from merely hearing them read, without the aid of counsel or clerk, the whole series of enactments of a legislative session, which would not be generally true then or now.

At all times careful revisals of the laws have been the greatest aids to a proper and economical (in point of time) means of understanding them. They were made then at the expense of more labor than now, and with a correspondingly less opportunity for general circulation. But nevertheless, revisals were made. They

¹I, Hening. Preface, v.

²*Post* page 190.

³Volume I. Preface, vi.

began with the year 1632 (printed about 1684-1687), and after that in the following years of the colonial period — 1642-43; 1657-58 (the commonwealth or interregnum period); 1661-62; 1705; 1722; 1737; 1752, and 1769.¹

At a meeting of the council held at the capitol at Williamsburg on May 5, 1741, the president reported the wish of the Lords of Trade to have copies of all the laws then in force in the colony. Thereupon, the council declared that a copy of all the laws having been lately collected and printed here,² and the work examined and corrected by the clerk of the House of Burgesses, a printed copy would fully answer the demand of their Lordships. It is said³ that there were earlier revisals, but that the one first printed was that of 1661-62 prepared by Francis Monyson, and long referred to as the "Printed Laws."

Thus it appears how little opportunity the public had to know and understand the current legislation of the lawmaking bodies, and how small a part the people generally had in making or in influencing the making of their own laws. But there were two prolific subjects of legislation made so conspicuous that it is hardly possible that they did not attract much interest, at least among the educated portion of the people. These were the church and the lawyers.

Although ecclesiastical jurisdiction over what was known as spiritual causes, was fully maintained in England, and matters matrimonial and testamentary were there tried by the Spiritual Court, and while at the same time the commissary of the Bishop of London

¹I, Hening V. Virginia Magazine. Vol. IX, 273. Address of J. Stewart Bryan before Virginia Bar Association, 1898.

²Probably referring to Mercer's Abridgment (1737), and the continuation printed in 1739. Virginia Magazine. Vol. XV, 122.

³Virginia Magazine. Vol. IX, 273.

held his ecclesiastical court in the colony, yet his jurisdiction was only over the immoralities of the clergy, with power of deprivation of and suspension from office; and the whole subject of spiritual causes was with a *profane* indifference to such fine distinctions, administered by the regular secular courts in Virginia along with, and with the same form of procedure, as any mere secular matter.¹ No absolute divorces, however, were granted in the colonial period, but divorces *a mensa et thoro* were granted both by the General and the County Courts; and marriages could be annulled by the General Court if the parties were within the levitical degrees being prohibited by the laws of England and Virginia.²

Among the earliest of the colonial laws³ was one covering the whole scheme for erecting churches, for requiring attendance at church services under penalties, for uniformity in doctrine and discipline, church holidays, the conduct of ministers, their pay, and "protection from disparagement."

By a later act⁴ ministers were prohibited from indulging in excesses of drinking, card-playing, etc.; were to perform marriage ceremonies, "but only between the hours of eight and twelve in the forenoon;" to preach one sermon every Sunday in the year; to catechise the youth, ignorant persons and also fathers, mothers, servants, etc.; to visit the sick; to keep the parochial records, and administer the sacrament.

During the commonwealth period the whole matter of the vestries, agreements with ministers, church-

¹Justice in Colonial Virginia, 7.

²*Id.* 71. A copy of a petition for a divorce, by a next friend, is printed in Vol. I, page 40, of the Virginia Magazine, and on page 175 of Vol. VIII is a copy of an order of the County Court of Lancaster, Virginia, for a divorce between John Smith and Mary his wife.

³I, Hening, 158. 1631-32.

⁴*Id.*

wardens, the poor, etc., was discreetly "referred to their owne ordering and disposeing from time to time as they shall think fitt," thus avoiding any embarrassing attention to church affairs from the "Roundheads" at home. The purchasing of glebes was provided for out of the levies.¹ Church ornaments and books were purchased² and chapels were built,³ and while "Quakers or other recusants" were excepted from the requirement of constant attendance upon the church services, they were, with curious inconsistency, made liable for the payment of much severer fines for absence from the services than the orthodox were, and were forbidden, besides, from "assembling in unlawful assemblies and conventicles," and the more able were required to pay the fines of the insolvents.⁴

Although these laws enacting penalties for not keeping holy the Sabbath day, prescribing severe punishments for those who did not hold, whether they could or couldn't, the orthodox faith of those who made the laws; for cursing, swearing, getting drunk, gambling, traveling on Sunday, working on Sunday, practicing immoralities,⁵—were enacted and re-enacted with endless persistency through all the colonial time, there yet came at a fairly early period⁶ the adoption of the Toleration Act of England, whereby Protestants dissenting from the Church of England were exempted from the obligation to attend the services of the Church, provided they should meet at their own places of religious worship once in every two months. This act, although known as the Toleration Act, was soon denounced as quite intolerant, but considering

¹I, Hening, 158.

²II, Hening, 29. 1660-61.

³*Id.*, 52.

⁴*Id.*, 48. 1661-62.

⁵III, Hening, 360.

⁶*Id.*, 171. 1699.

the utterly dogmatic and intolerant spirit of that age in all religious matters, it seems to have been a fairly good start in the right direction. Of course, the only effectual cure for unfair and troublesome conditions between the different religious bodies was the remedy later applied, that is, a complete divorce of Church from State, and the protection of absolutely free religious worship and opinion. But it was then much too early to have expected such a complete change from conditions so long maintained. This was only to come after, when an even more radical change had occurred in the political relations of the colony with the mother country.

While the church and the clergy did not escape the sometimes unwelcome fostering care of the lawmakers, the same inconvenient paternalism was manifested towards the lawyers.

The enactment of such laws was, of course, a fairly good indication of the need of them in the first half of the seventeenth century. There was but little business then for lawyers, of a legitimate character, and they lived more by their *practices* than upon their practice. "The legal profession," says Mr. Fiske,¹ "was at first held in somewhat low repute, being sometimes recruited by freed men whose careers of rascality as attorneys in England had suddenly ended in penal servitude." Their capacities for mischief were only limited by their opportunities, and the exercise of their talents in this direction made them the subject for many years of most drastic legislation. This was by no means a uniform condition, and after the middle of the seventeenth century, and especially in the first half of the eighteenth century, the profession grew rapidly in importance and improved in character.²

¹Old Virginia and Her Neighbors. Vol. II, 266.

²*Id.*

Professor John B. Minor¹ thought that the adverse legislation of 1642 and subsequently, was due to jealousy between the aristocracy of birth represented by the Assembly and the aristocracy of merit represented by the lawyers. But Mr. Chitwood,² who quotes Mr. Minor's views, thought it "more probable that this unfriendly attitude of the ruling class towards the legal fraternity, was caused by the lack of ability and character of the early lawyers." The last is doubtless the real reason, but lawyers as a class, in spite of the great political, religious and social influence of the profession, have never been popular with the masses, and consequently proportionately unpopular with the elected representatives.

By the planters, who mainly made up the membership of the General Assembly during the earlier years, it is not to be wondered that the whole race of lawyers should be regarded with some degree of contempt, even at their best, but the crowd of mere mercenary adventurers who by stirring up litigation for the profit which might be in it, destroyed the peace and good feeling of the country neighborhoods, naturally provoked the utmost efforts for their extermination by whatever means the law could afford.

Beginning in 1642-43,³ with the very proper requirements that lawyers should be licensed, their fees regulated, and every lawyer compelled to appear when retained, unless employed on the other side, it was only about three years later⁴ that all "mercenary attorneys" were wholly expelled from their offices as such, because, as the act says, they "more intended

¹Minor's Institute. Vol. IV, Part 1, pp. 163, 168.

²Justice in Colonial Virginia, 118.

³I, Hening, 275.

⁴November, 1645.

their own profit and their inordinate lucre than the good and benefit of their clients." This act was soon after re-enacted, and at the same time the act providing for licensing attorneys was repealed.

It followed before very long, quite naturally, that "It is thought fitt that vnto the act forbidding mercenary attorneys,¹ It be added that they shall not take any recompense, either directly or indirectly,"² and the parties themselves, or by some other person, by special appointment of the court, might appear in their causes, in which case only could "satisfaction requisite" be allowed.

But with a degree of vacillation which indicates the inadequacy of previous remedies, in December, 1656,³ all the acts against mercenary attorneys were repealed, and the governor and council for the "Quarter Courts" and the commissioners for the County Courts, were permitted to "appoint and allow such as they shall find fitt and able to be attornies."

The act provides that the attorney shall take an oath, which, however, was not included in the manuscript copy of the law, probably because in March, 1657-58,⁴ but a few months after the passage of the act, the former legislation against "mercenary attornies" was revised and re-enacted with full force, and it was forbidden that "either lawyers or any other shall pleade in any courte of judicature within this colloney or give councill in any cause or controversie whatsoever, either directly or indirectly" under a heavy penalty, and every one

¹The persons referred to as "attorneys" were not always lawyers, but were sometimes mere agents acting under powers of attorney. Justice in Colonial Virginia, 116.

²A lawyer's bill of fees of that period was as minute and detailed as a plumber's bill of the present day is, and was doubtless quite as aggravating. 15s. was ordinarily charged for a suit and 10s. for writing a letter or other paper. Virginia Magazine, Vol. VII, 210.

³I, Hening, 419.

⁴*Id.*, 482.

appearing for another in any cause was compelled to make oath that he was not "a breaker of the act aforesaid."

The declared occasion for the act of December, 1656, repealing the laws against "mercenary attornies" was the "findeing many inconveniences in the act," which I suppose means from suitors representing themselves, or being represented by ignorant, incapable or dishonest persons before the court.

The reason given for re-enacting the prohibitory laws now was, that "there doth much charge and trouble arise by the admittance of attorneys and lawyers through pleading of causes thereby to maintain suites in law, to the greate prejudice and charge of the inhabitants of the colloney for prevention thereof." So the poor legislators in their endeavors to find a remedy were between the devil and the deep sea, and so they remained for many years to come, indeed until conditions had begun to better themselves, but not by reason of any of their acts; for, untaught by their experience of the inadequateness of the legislative remedies, they continued to enact and re-enact them from session to session, mending here and there a weak spot and making another, still hoping, no doubt, that they would at last find some plaster that would draw. Finally, apparently as a radical resort, it was, on March 26, 1658,¹ by the Assembly "proposed whether a regulation or a totall ejection of lawyers?" On the vote the burgesses said, "An ejection." But the Governor and council answered that they would consent to this proposition "so farr as it shall be agreeable to Magna Charta."²

¹I, Hening, 495.

²The matter, upon being referred to a committee, was, however, reported on as follows: "We have considered Magna Charta and do not discover any prohibition contained therein." *Virginia Carolorum*, 264. On another occasion the same point was made before the burgesses. *Justice in Colonial Virginia*, 117.

Thus, in spite of the General Assembly's several times repeated declaration that no court could ever revise or pass upon any enactment of the General Assembly, one branch of their body seemed to have a lurking suspicion that somewhere there was some sort of power that protected the natural rights of men against the imposition of the penalty of expulsion without either trial or conviction, and for an offense, too, which of itself could hardly be called a crime. After all it was not such a far cry from this answer of the council that legislation must be limited by the terms of Magna Charta, to John Marshall's judicial declaration that in a conflict between the evanescent laws and the permanent constitution, the latter prevailed.

By June 8, 1680,¹ matters had come to such a pass that the courts were "many times hindered and troubled in their judicall proceedings by the impertinent discourses of many busy and ignorant men who will pretend to assist their friend in his business and to clear the matter more plainly to the court although never desired or requested thereunto by the person whom they pretend to assist, and many tymes to the destruction of his cause, and the greate trouble and hindrance of the court."

So the much perplexed legislators who could neither eject the bad lawyers nor yet make them good, again called in the regular members of the profession and resolutely shut out all the "busy and ignorant" laymen; requiring that every one who should appear either before the General or the County Court shall have been licensed. In such case the attorney could receive for his services the amount of compensation fixed by the act. At the same time a penalty was

¹II, Hening, 478.

imposed upon any licensed attorney who should refuse to plead any cause when his fee should be paid, but the suitor, if he chose, was still at liberty to manage his own case. But this quite reasonable act did not seem to work right, and in November, 1682,¹ it was enacted that the act of June 8, 1680, "and every clause thereof from henceforth be repealed and made voyd."

So, there being no law for or against practising for compensation, and, on the other hand, their right to do so being incidentally recognized by the act of 1718,² which allowed "one attorney's fee in the bill of costs, if he employ'd any in his suit," the lawyers appear to have proceeded to business, but by this time a far better class of men had come to the bar, and the reasons for drastic legislation were beginning to disappear. But as to the provision for taxing an attorney's fee in the costs, it was still provided that if the court should find that the defendant did unjustly and vexatiously delay the plaintiff it might allow him one attorney's fee in the bill of costs, if he had one employed.

Other acts followed, more particularly for regulating the amount of the lawyers' compensation, but the unregulated right of any individual to practice law was not to be tolerated long in a society which regarded a law as the proper remedy for every evil condition; so by an act of May, 1732,³ which was during the time of the active professional life of our reporters, it was declared that "the number of unskilled attorneys practising at the County Courts is become a great grievance to the country in respect to their neglect and mismanagement of their clients causes, and other fowl practices."

So the General Assembly reinstated the license law

¹II, Hening, 498.

²IV, Hening, 59.

³*Id.*, 360.

for those who should desire to practise in the county and inferior courts, and as a sort of preventative to further evils of the "fowl practice" kind, provided for those offering to practise in the county and inferior courts the following quite suggestive oath:

"You shall do no falsehood, nor consent to any to be done in the court; and if you know of any to be done you shall give notice thereof to the justice of the court, that it may be reformed; you shall delay no man for lucre or malice, nor take any unreasonable fees; you shall not wittingly or willfully sue, or procure to be sued, any false suit, nor give aid nor consent to the same upon pain of being disabled to practise as an attorney for ever. And furthermore you shall use yourself in the office of an attorney within the court, according to your learning and discretion."¹

At this date a distinction seems to have been clearly recognized between the class of men, in lower Virginia at least, who practised in the County Courts alone, and those who appeared in the General Court, for the act we have been considering provides that it "shall not be construed to extend to any attorney, who at the time of passing thereof, is a practitioner in the General Court, or to any counsellor or barrister at law, whatsoever."

But it would be tedious, probably already has been, to follow further the vacillating and often futile course of legislation on this subject. It is enough to say that it was kept up, in a somewhat modified form, according to the old fashion, until by the act of October, 1748,² very reasonable provisions were made for licensing lawyers to practise, and this oath prescribed:

¹The colony of New Hampshire in 1686 prescribed an oath so very similar to this that it can hardly be doubted that the Virginia Oath was copied from it. IV, Hening, 360.

²VI, Hening, 140.

"I — A. B. — do swear that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability, — So help me God."

But even after this time, and on up to the revolutionary period, acts were passed regulating the conduct and rights of attorneys, but no change appears to have been made in the oath required by the act of 1748 until, in May, 1776, there was inserted in the form of the oath, a promise "to be faithful and true to the Commonwealth of Virginia," and the form as thus amended has, without substantial change, continued in use ever since.¹

Meanwhile, there had been laws enacted from a very early period, and changed from time to time, with regard to the sessions of the General Assembly, and the terms of court, their jurisdiction, rules of procedure in them, pleadings, fixing the causes for hearing, the conduct, control and pay of the officers of the County and General Courts, the right of appeal from the County to the General Court, appeals from judgments of justices of the peace to the County Courts, and the details of trials before each of the courts, including the selection of the juries, the summoning of witnesses, etc., of all of which things the present practice is but a reasonable modification or enlargement.

And now having said so much for the laws of those early days, a few words about the lawyers who practised about the time that Barradall and Randolph wrote their reports, and who probably did not differ very much from their immediate predecessors and successors, may add interest to this narrative as giving us a clearer idea of the environment within which

these reports were written, and of how the cases then reported were tried.

Sketches of Sir John Randolph and of Edward Barradall are reserved for a later chapter, so that we may know them better in connection with their work as reporters. But it is proper to add here that although both of these men died long before they reached middle age, yet they had become among the most prominent and able lawyers of their generation.

In colonial times there was no law school in Virginia, but many who were able to do so went to England and studied law there in the Inner Temple or in Gray's Inn. The majority, however, had to be content with reading law in the offices of the older lawyers, and this practice, indeed, was kept up very generally in Virginia even up to the time of the civil war.

The student of the earlier times was put to read his Coke, for that was before the day of Blackstone, some work on pleading, evidence, the law of contracts, and then a general survey of the statutes in force at the time. He was expected, meanwhile, to do some of the office work, and, incidentally, opportunity was afforded him to familiarize himself with the procedure in the clerk's office, and with the courts so far as listening to the trials of cases afforded it. As a rule, payment was not exacted for this sort of education, and the student was apt to be put to study with the lawyer who was his father's friend and counsel.

While the law required licenses to be gotten by those who proposed to practise, the applicant had to submit to an examination conducted under the direction of the court. But as neither the justices who held the County Courts nor the members of the council were lawyers, this examination was submitted to a committee of lawyers, of which the orders show that the attorney-

general of the time was usually one. This committee would submit its report to the council, which would pass upon the application.¹ Their examinations were no doubt often, as later they generally became, matters of form; but with some of the attorney-generals it meant a real test, and students were sometimes put to it to win their certificates. Equipped with the license, however, and having duly taken the oath before the court, and being enrolled in the list of practising attorneys, the new member of the bar would open his office in the Court-house village, or not infrequently at his home on the farm, and sit down to wait for practice. This generally came slowly and sometimes not at all. Nor was it uncommon for a lawyer of that day to engage also in some other pursuit while still a seeker for and even after attaining to a fair practice.²

William Fitzhugh, who was the grandfather of Edward Barradall's wife, and who died at Bedford, his seat, in October, 1701, in his fifty-first year, was born in England, January 9, 1651, and educated there as a lawyer. He was a son of a member of the English bar³ and came to Virginia in 1670, settled in West-

¹By act of 1745 (Hening, Vol. V, 345) the councilors themselves were required to make the examinations.

²Mr. Lodge (English Colonies in America, 53) speaks of the earlier lawyers as being "for the most part pettifoggers and sharpers, broken adventurers from London, and indented servants, who having been convicted, chose on their release the profession which, in a rude state of society, gave them the best opportunity of fleeing the community." He declares that William Fitzhugh was the only man who appears to have attained an honorable eminence, simply as a lawyer, in the seventeenth century. In 1734, he states there were two lawyers, whose names he does not give, although he evidently refers to Holloway and Hopkins (of whom hereafter), who had displayed ability and achieved success in their profession, but one of them was "a broken down London practitioner." But of Sir John Randolph, he says, he "was a conspicuous and learned advocate." See also on the subject of the early lawyers, Virginia Carolorum, 191.

Under some of the acts of the General Assembly the distinction was made, that lawyers practising in the General Courts were forbidden to appear in the County Courts, but exceptions were made as to certain counties and as to the Court of Hustings of Williamsburg. VI, Hening, 143.

³Virginia Magazine. Vol. I, 17. Bruton Church, 102.

moreland County, and married there a Miss Sarah Tucker. Col. Fitzhugh was a very rich man and left a great estate to his eldest son William, whose daughter Sarah, named, doubtless, for her grandmother, became the wife of Barradall.¹ This son, William, was appointed a councilor in 1711, and died about January, 1713-14. As his daughter, Mrs. Barradall, died in October, 1743, at the age of thirty, she was a posthumous child. Her only brother, Henry Fitzhugh, of "Eagle's Nest," was quite prominent in the colony, and was the great-grandfather of Bishop Meade,² of whose writings much use has been made in this introduction. He was also the ancestor of the wife of Gen. Robert E. Lee.³

John Holloway⁴ and William Hopkins⁵ were lawyers of distinction and contemporaries of Sir John Randolph and Edward Barradall.

A sketch of each of these men, written by Sir John Randolph, is to be found in a small quarto volume of manuscripts presented to the Virginia Historical Society by John Page, Esq., of Williamsburg, January 3, 1834. This little volume belonged to Chancellor Wythe and is altogether in his handwriting, except that part headed, "Taken from Sir John Randolph's Brevait Book." This part is the sketch referred to, and it seems not to be in Chancellor Wythe's handwriting. This sketch was printed in Virginia Historical Register, Vol. I, page 119, (Maxwell's Register, Vol. I, page 119) but it could hardly have been expected by Randolph that it would be made public. Nor was it published

¹See his will. Virginia Magazine, Vol. II, 276. He made large bequests also to his sons Henry, Thomas, George and John, and left a fair property besides to his widow.

²See chapter V, The Church.

³Virginia Magazine. Vol. II, 279.

⁴He who built a private gallery in Bruton Church.

⁵He also reported in manuscript a few cases, of which only a fragment of one remains.

for more than a hundred years after it was written, and then, as "valuable not only as giving us the characters of two prominent lawyers of that early period but as being written by a third who was himself the attorney-general at the time." Randolph, in this sketch, admits the high reputation of Mr. Holloway¹ and says that he was much sought after by clients and was singularly successful in winning cases; that he had great diligence and industry "and practised with much artifice² and cunning being thoroughly skilled in attorneyship." But he thought he reasoned poorly and was a tedious speaker, "for learning I never thought he had any, nor shld it be expected he should; He had served a Clerkship; went a youth afterwards into the Army in Ireland in the Beginning of King Wms Reign; after that betook himself to Business having got to be one of the Attorneys of the Marshalsea Court; but not being contented with his income from that, turned projector and ruined himself, which brought him first into Maryland and afterwards hither."

After reciting instances in support of his criticisms, Randolph says: "However his reputation was such that he was universally courted and most People thought themselves obliged to win if he would engage of their side upon any Terms; and he really thought so himself. This gave him great opportunities of exacting excessive Fees which I have heard he always did, where the value of the thing in question would allow it; and covered great Blemishes in one Part of his private Life — besides many imperfections of his mind which any Body might observe who Knew anything of him. He was of a haughty insolent nature; passionate and peevish to the last Degree. He had a

¹As to Mr. Lodge's reference to these men see *ante* page 179.

²Meaning *skill*.

Stiffness in his Carriage which was ridiculous and often offensive; and was an utter Stranger to Hospitality. He was sincere in his Friendships when he professed any, but not constant, apt to change upon small provocations, and to contract new Friendships upon very slight Grounds, in which he would be very warm and ready to do all good offices. One of his greatest defects was that he would always bring his Opinion and his Friendship to agree. But what he wanted in Virtue and Learning to recommend him was abundantly supplied by fortunate Accidents. He was 14 years Speaker of the House of Burgesses and 11 years Public Treasurer. But in these he acted with little Applause and less Abilities, though he was three times chosen and once unanimously. His management of the Treasury contributed to his Ruin and brought him to his Grave with much Disgrace. I was always his Friend¹ and had a great Deal of Reason to believe him mine, yet it was impossible to be blind to some Imperfections. He died little lamented in the 69th year of his age."

Holloway and Hopkins are both mentioned by Dr. Tyler² as among the great lawyers resident in Williamsburg, John Clayton and Sir John Randolph being the others named. Holloway was also the first mayor of the town.³

William Hopkins died in 1734 in London, within a few days after the death of Holloway, having practiced law twelve years in the courts at Williamsburg. Of Hopkins, Randolph speaks with a much more qualified degree of condemnation than he does of

¹But if Holloway could have read it, he would probably have preferred that *some enemy* had written his obituary notice.

²Williamsburg, 24. Spotswood said that Holloway, while acting as judge of the Vice Admiralty Court, accepted fees from a pirate for services as counsel, and was only prevented by a protest from the other judges of the court, from sitting at his trial. For this he was forced to resign. Spotswood's Letters. Vol. II, 356.

³Williamsburg, 26.

Holloway. "By hard Study and Observation," he says, Hopkins "made a surprising Progress; became a very ingenious Lawyer and a good Pleader, tho at his first coming he was raw and much despised. But he had a carelessness in his Nature, which preserved him from being discouraged, and carried him on till he came to be admired. He had a good foundation in School learning, understood Latin and French well, had a strong Memory, a good Judgment; a Quickness that was very visible, and a handsome Person — all mighty Advantages. But his manner was awkward, his Temper sower, if it was to be judged by the Action of his Muscles, and was given, was too much given, to laugh at his own Discourses. When he had brought himself into good Business, he almost totally neglected it, which I believe was owing to a Desire of Dipping into all kinds of Knowledge where he had a good Deal of vanity, and preventing his Digesting what he had, so well as he would have done otherwise. He had many good Qualities in his Practice; was moderate in his Fees; Ingenuous and Earnest, never disputed plain Points, but was a candid fair Arguer. Yet he had a failing which brought him to a Quarrel with me. It was an odd sort of Pride that would not suffer him to keep an Equilibrium in his own conceits — He could not see himself admired without thinking it an injury to him to stand upon a Line with any other. And therefore tho I was always his Friend, had done him many kindnesses, and he himself thought himself obliged to me, He came into so ill a Temper as not to allow me either Learning or Honesty, which broke our acquaintance, and after that I thought I discovered some seeds of Malice in him. He died in the flower of his Age, and may be justly reckoned a Loss to this poor Country.

which is not likely to abound (at present at Least) in great geniuses."

So frank a discussion of the merits and demerits of two friends, written down apparently shortly after the death of both of them, could hardly have been expected ever to reach the public eye. For that reason it must be taken to have been the dispassionate judgment of the writer upon each of the subjects of his criticism. In the main it was no doubt a true picture, drawn as fairly as could well be by a contemporary and competitor in professional business, but not to be read without keeping in mind those conditions which disqualify for absolutely just judgment.

But the value of this little memoir is all the greater because while Randolph wrote of Holloway and Hopkins he held up also a mirror unscreened to his own personality. If Holloway and Hopkins had small jealousies and resentments, little vanities that men do not often tell about themselves, surely Randolph has unwittingly written these down of himself. But we of a hundred and seventy-five years later are the gainers, for the picture thus given of these two men is much the picture of the lawyers generally of their class and time.

Hopkins, like Randolph and Barradall, was also a reporter. Mr. Jefferson speaks of Hopkins' as being one of the three volumes of manuscripts reports, in the possession of John Randolph, son of Sir John Randolph, when he, Jefferson, was practising in the General Court. One of Hopkins' reported cases¹ is included by Mr. Jefferson with his own reports, but of the manuscript reports of Hopkins there now remains but a fragment — four pages, apparently auto-

¹Curtis vs. Fitzhugh, Jeffn. 72. The date of 1768 is given as the time that Mr. Jefferson prepared these reports.

graph — of another case than the one included in Jefferson's reports.

John Clayton, another contemporary of Randolph and Barradall, was at the time of his death attorney-general of Virginia, and was a lawyer of high standing. He was born in 1665 and died November 18, 1737, in his 72nd year, and was succeeded in his offices of attorney-general, judge of the Court of Admiralty, and of member of the House of Burgesses, by Edward Barradall. He was educated at one of the universities of England, probably Cambridge; was admitted to the Inner Temple, June 6, 1682; came to Virginia in 1705; appointed attorney-general of the colony in 1714, and held that office continuously up to his death, and was also, meanwhile, frequently a member of the House of Burgesses; and besides all these numerous offices he was presiding justice of the County Court of James City County, and recorder of Williamsburg.

Clayton came of a good English family, being the son of Sir John Clayton of London, grandson of Sir Jasper Clayton of St. Edmunds, Lombard Street, London, and brother of General Sir Jasper Clayton of the British Army.¹ His mother, Alice, was a daughter of Sir William Bowyer, and his son John Clayton, was a distinguished botanist and author of "*Flora Virginica*." He was for fifty years the clerk of the County Court of Gloucester County, Virginia, and lived at "Windsor" on the Pianketank, where he had a botanical garden.

The attorney-generals of Virginia whose opinions are reported by Barradall² are Sir William Jones, 1681, Sir Edward Northey, 1713, and S. Thompson, Esq., 1713, but these cannot be accounted for as contemporaries.

¹Virginia Magazine. Vol. IV, 163. There is also a sketch of him among the sketches of the attorney-generals in William and Mary Quarterly.

²Manuscript, p. 26.

There were other lawyers practising in the General Court and at Williamsburg in the time of these reports, but none of sufficient note to have left any public record of themselves.¹ Among them is the name of Harry Barradall, a brother of Edward Barradall, who died at his brother's house September 16, 1737. His name appears on the family tombstone in Bruton churchyard as "Qui obiit XVIII Cal, Octob A.D. MDCCXXXVII. Ætat XXVII." Dying thus at his brother's house at the age of twenty-seven, and no mention being made of his posterity, or, indeed, of any posterity of the Barradall name, Harry was probably a bachelor, and had not been long enough at the bar to have made any reputation.

In the list of the public officers of Virginia in the year 1680,² appear the names of thirty-three lawyers, all of that profession in the colony at that time. They appeared in the list because they were regarded and treated as public officers by virtue of their profession. Except the name of William Fitzhugh ("ffitzhugh"), none of the names of lawyers of any note appear in the list. The names also of Benjamin Needler, Thomas Reeve and "Mr. Frances" appear in the manuscripts as having been counsel in some of the cases reported by Barradall. None of these names appear in the list of 1680 and, except that of Needler, I have been able to find no other mention of them anywhere.

Benjamin Needler was at one time clerk of the council. His death occurred in 1740-41 and at a session of the General Court held April 23, 1741, John Blair was sworn as clerk in his stead.

¹Sterling, Clark and John Palmer were admitted to the bar in 1740, and for the last named Barradall certified. *Virginia Magazine*. Vol. XVII, 266. Clark was probably the son of Rev. James Clark of Ware Parish, Gloucester County. He was at one time the clerk of the County Court of Brunswick County. *Virginia Magazine*. Vol. VIII, 60.

²*Virginia Magazine*. Vol. I, 252.

At the same session, Edmund Pendleton and John Wayles petitioned for licenses to practise as attorneys in the County Court, and these applications were referred to the attorney-general or to Mr. Francis.¹ Edmund Pendleton was a distinguished lawyer of a little later period, and the first president of the Virginia Supreme Court of Appeals.²

John Wayles of "The Forest," Charles City County, was born in Lancaster, England, in 1715. He was King's attorney for the county in 1756, and was a prominent lawyer and acquired a large estate. He died in 1771. His daughter Martha married, first, Balthurst Skelton, and secondly, Thomas Jefferson.³

John Blair, who was appointed to succeed Benjamin Needler as clerk of the council, was a nephew of Commissary James Blair. It was his son John Blair, born in Williamsburg in 1732, and educated at the Temple, London, who became a prominent lawyer of the pre-revolutionary period, and took an active part in the events of 1776-1783. He was judge of the Court of Appeals of Virginia and of the Chancery Court, and in 1789 was appointed by Washington a judge of the Supreme Court of the United States.

Among the lawyers of note who were boys or young men during the active professional lives of Randolph and Barradall, and were the well-known lawyers of the generation next to theirs, were Robert Carter Nicholas, 1715-1780; Edmund Pendleton 1721-1830; George Wythe, the Chancellor, 1725-1806; Patrick Henry,

¹Virginia Magazine. Vol. XV, 12.

²He was one of the truly great men of his time, was president of the Convention of 1726, defeating Patrick Henry for that position; wrote the opinion in the church case which came to naught by his death; and was the first president of the Court of Appeals. Jefferson said of him, that he was the wisest man he ever knew.

³Virginia Magazine. Vol. XV, 12. She was a childless widow of twenty-two years, and married Jefferson, January 1, 1772. She was very beautiful and at her father's death became very rich. She died September 6, 1782, aged thirty-four, leaving two children, Martha and Mary.

1736-1799; Peyton Randolph, 1721-1775, and John Randolph, 1727-1784. The two last were sons of Sir John Randolph and were lawyers of ability. Both were conspicuous in the affairs of the colony, and Peyton Randolph in the events which led up to the Revolution. He presided over the Virginia Convention of August 1, 1774, and was the first president of the Continental Congress. He died, however, on October 22, 1775, very early in the beginning of the Revolution.

John Randolph, being the attorney-general of Virginia and the adviser of Governor Dunmore, regarded himself as in honor bound to the British side. He therefore at the beginning of the Revolution went to England, and died there in 1784. His body was brought back and buried in the chapel of William and Mary College. He was the last colonial attorney-general of Virginia and his distinguished son, Edmund I. Randolph, was the first attorney-general of Virginia under the new and republican constitution.¹

All the lawyers thus far mentioned were from the eastern and old part of Virginia. But few had settled beyond the mountains, and there is only one of any distinction who was at the bar at a time near enough to the period under consideration to call for mention here. That one was Gabriel Jones, a character so striking as not to have needed the rivalry of contemporaries to make him a very conspicuous personage. He was born near Williamsburg, May 17, 1724, was carried to England while an infant, educated there at the Blue Coat School, and studied law with Mr. John Houghton, a Solicitor in Chancery in Middlesex, and died in 1806. He returned to America before he was nineteen years of age, went to the Shenandoah

¹He died in Clarke County, Virginia, September 13, 1813.

Valley of Virginia to live, was made King's Attorney of Frederick County at the age of nineteen, and of Augusta County at the age of twenty-one. He was many times a member of the House of Burgesses from both Augusta and Frederick Counties, being of those who adjourned to the Raleigh Tavern in 1775; was a member of the Continental Congress, and appointed judge of the General Court as it was reorganized after the Revolution, but declined to serve. He was also a member of the Virginia Convention of 1788.

A graphic description is given of Mr. Jones by Hugh Blair Grigsby,¹ who represents him as remarkable for his ability in his profession, his success in amassing a great fortune, and his high standard of right. His great weakness was his combustible nature, and many anecdotes are told of his exhibitions of uncontrollable temper. But he was, withal, a man of great benevolence, and the accounts of his charities have come out in curious ways, for he was a man who never let his right hand write down anything for his left hand to find out. Mr. Grigsby says of him: "He had no concealments, in public or in private. He was never worse than he appeared to be. In the relations of private life he was punctual, liberal and honorable. The man never lived who doubted his integrity."²

What tools these lawyers used in their work is an interesting subject of inquiry. This chapter, although already prolonged beyond expectation, would not be complete without some account of them. Naturally, the object of their greatest and first need

¹Virginia Historical Collections. Vol. X. Virginia Convention. Vol. II, 16
See also sketches of Gabriel Jones, his portrait and coat of arms, *West Virginia Magazine*, April, 1902, page 19, and *Annals of Augusta County, Virginia*. Jos. A. Waddel, 31, 166, and Supplement, 1888, page 392.

²Godfrey Pole of Northampton County, was conspicuous among the successful country lawyers. *Virginia Magazine*. Vol. XVII, 147.

was ready access to the statute laws of the land. The colonial lawyers were always badly off in this respect. Up to 1684, the Acts of the General Assembly existed only in manuscript, and the public only had access to the single copy which was sent to each clerk's office.¹ The officers of the government, of course, had copies, and the lawyers generally were provided with them, but these perishable and inconveniently handled manuscripts were most unsatisfactory methods of consulting the law, for which the lawyers in active practice had almost daily need.

Between 1684 and 1687,² however, there was printed in London a collection of the acts from 1661-62 up to that period. Its title was, "A Complete Collection of the Laws of Virginia," which was printed in large letters across the tops of every two pages of the book. At the commencement of the acts for each particular session the sentence constituting the title was extended by the words (run down the page) "at a General Assembly held at James City 23 March 1666" or whatever the particular date was.³ A man named Purvis⁴ was the author, or rather the editor of the collection, and deserved great credit for such an enterprise. But, withal, the work was very defective. The acts are not printed in the order of their passage, but instead, some attempt is made to

¹Hening. Vols. I and VI.

²The publication gave no date of its issue.

³In I, Hening, 123, is printed from a manuscript, what is entitled "The first Laws made by the Assembly in Virginia, Anno MDCXXIII." The manuscript bears this inscription in the handwriting of Mr. Jefferson: "This was found among the manuscript of Sir John Randolph, and by the Honorable Peyton Randolph, Esq., his son, was given to Thomas Jefferson."

⁴In the copy which I examined, the name "Pervis" (Purvis was the proper spelling) is written at the top of the title page, indicating, as was true, that this was the name by which the book should be called. On the right hand margin of the title page, in ink so pale that a magnifying glass has to be used to decypher it, in the handwriting of Mr. Jefferson and over his initial "Th. J." is written: "This book was given to me by John Page of Rosewell, the grandfather of Mathew Page of Rosewell."

classify them under titles of different subjects, as "Church," "Courts," etc.; but this is very inadequately done. Nor, except the years, are the dates of the acts given at all, although the date of the beginning of each session is given. There were many errors in the copy examined, which had been corrected with a pen, but at the back of the book there was a fairly good index and a set of forms called "Precedents." Henning says¹ that this collection was "so grossly inaccurate, that but little use will be made of it in the present edition."² On comparing it with the manuscripts embracing the same period, and which are of undoubted authority and accuracy, it has been discovered that not only entire sentences, but whole acts are omitted, besides innumerable typographical errors, which totally vary the sense."

Still, this first effort at printed codification must have been received as a boon to the *actless* lawyer, and those lawyers showed their appreciation of it by the constant use they made of it, discarding its elaborate title and calling it and citing it only as "Purvis," or "Purv," as if that was a pet name for it.

There came later from London a quite well printed and bound copy of the "Laws of Virginia" from 1662-1715, and one as of the date of June 20, 1720,³ by Col. William Beverly entitled "Beverly's Abridgment," containing the acts from 1642-1720.

One edition of "Mercer's Abridgment" came out in 1737, with a "continuation" in 1739 and a second edition in 1758. The first edition contained the acts from 1661-1736, but they were printed with no regard to the order of their passage. This edition had what

¹Vol. I. Preface, v.

²Of the Statutes at Large.

³A rare instance of the date of the publication being given.

were called "Tables" — 1, 2 and 3; they are really fairly good indexes, and there is at the end of the book a set of forms called "Precedents."

When the acts came to be printed regularly as they were passed, which was commenced at Williamsburg about 1733, they came out in different sizes. One copy, which I measured roughly, I found to be ten by seven inches, but there were differences of an inch or more in the lengths, the size aimed at in all being apparently folio. The acts of each session have been bound, long after they were printed, and are attractively slim in their proportions.

The text books and reports used are gathered principally from their citation in the manuscript reports, from inventories of the estates of the owners, and from letters of some of the lawyers discussing legal propositions.

Coke on Littleton was, of course, a favorite, for it was then too early for Blackstone. Dalton on the "Office of Sheriff" is cited, and there is still preserved, in good condition, in the office of a Williamsburg lawyer, a folio volume which must have been a great aid to the lawyers of 1737 and subsequently. It bears the unusually brief title, "A Treatise of Equity."¹

The inventory of the estate of a lawyer,² of a time enough later than that of Randolph and Barradall to have in it a copy of Blackstone's Commentaries, but which also contains the earlier books, names Bacon's Abridgment, Peere Williams' Report, Coke's³ Reports, Strange's Reports, Grounds of Law, Jacob's Law Dictionary and Vattel's Law of Nations. Among

¹"In the Savoy. Printed by E. and R. Natt and R. Gooling (assigns of Edward Sayer, Esq.) for D. Browne at the Black Swan without Temple Bar, and I. Shucklough, at the Sun, next the Inner Temple in Fleet street. MDCCXXXVII."

²Virginia Magazine. Vol. II, 225.

³Sometimes spelled "Cook."

the reports cited are Dyer's, Hobart's, Salkeld's and Keliway's. There are quotations, too, from Bracton, Britton and Fleta, from the writings of Noy and Winch, and the British statutes are, of course, frequently referred to.¹

Compared with the present day, reports of decided cases and text books were very few in number, and consequently there were no great digests such as now are essential to the use of the reports. But as there was so little case reading there was a proportionably greater resort to primary principles. The arguments of counsel, therefore, make up the greater part of the cases reported in these manuscripts, and they are generally too long to make their reading agreeable to the greater number of the later day lawyers. But those both of Barradall and Randolph show ability and learning and as much research as the material available afforded.

¹Cook's Reports, Dalton's Justice, Herne's Pleader, Swinbourne on Wills Compleat Clarke, Curson's Office of Executor, Law of Infants, Compleat Conveyances, Noyes' Law of Tenures, and other such books, are in the inventory of the estate of Godfrey Pole. Virginia Magazine. Vol. XVII, 148.

CHAPTER IX

THE COURTS

After population had spread far enough away from James City to make it inconvenient for the people to attend court there, and in order that justice might, as nearly as possible, be brought to every man's door, it was by act¹ of the General Assembly provided, that courts should be "kept once a month in the corporations of Charles City and Elizabeth City for the decyding of suits and controversies not exceeding the value of one hundred pounds of tobacco and for punishing of petty offences."

This was the first step taken *by law* for the establishment of the Monthly Courts which were afterwards given the English name of County Courts. The peculiarity of this first organization, however, was that the judges of this court were "the Commanders of the places and such others as the governor and council shall appoint by Commission;" for the commander was a military personage, having high authority over the plantations, although, as there was no such thing as a separate army organization in the colony, in spite of his function of imposing penalties for such breaches of discipline as swearing and drunkenness, his duty to provide a sufficiency of powder and ammunition, to levy forces to repel the Indians, to exercise the men under his command, and to take an exact muster of the men, women and children on "holy dayes,"² he had duties sufficiently of a civil nature not to incapacitate him from acting as judge of these monthly courts; yet still the form of commission

¹March, 1623-24. I, Hening, 125.

²I, Hening, 126, 127, 140, 175.

issued had quite a military phraseology, the appointee being authorized "to command and govern the several plantations and inhabitants within the same," and of the first appointments made under the act for holding the "Elizabeth Citty" Court, four of the eight persons named were captains and lieutenants, and while any three of the eight could constitute a court, it was necessary for "Capt. Thomas Purfury or Lieut. Edward Waters to be alwaies one." In the first commission¹ issued for holding the court, the appointees are styled "Commissioners to hold the monthly courts," and this title they kept until by the act of February, 1631-32,² the commissioners were given the authority "to doe and execute whatever a Justice of peace, or two or more Justices of peace, may doe."

Henceforth they are called justices of the peace, and after the name of the court was changed³ from Monthly to County Courts, and additional counties had been created and courts organized for them, and the courts had correspondingly grown in dignity and importance, it was provided,⁴ as seems already to have been the practice,⁵ that the court should consist of "eight of the most able, honest and judicious persons of the County." This number did not always so remain, varying at different times and in different counties, but usually ranged from about eight to eighteen.⁶

Nor did the method of choosing these justices continue the same. At first appointed by the Governor and council and then for a time elected by the House of Burgesses, it was at length provided that the

¹I, Hening, 132.

²*Id.*, 169.

³Act, March, 1642-43. I, Hening, 272.

⁴March, 1661-62. II, Hening, 69.

⁵Justice in Colonial Virginia, 75.

⁶*Id.*, 77.

justices of the County Courts were to be chosen by the Governor and council on the recommendation of the County Courts. This practically came to mean a self-perpetuating body, with less of democracy but much more of efficiency, and, for a court, perhaps the ideal method of perpetuating the best and most independent membership.

So this system continued in Virginia until many years after the Revolution, and until an overgrown suffrage demanded and secured the sacrifice of this wise plan of selection, to the Moloch of a licentious freedom.¹ Nor in the experiment did it result that this became any more, but rather the less, what it was intended to be, a people's court.

At one time in its history it became difficult to secure the necessary number to hold the court, of which at the beginning only three were required to constitute a quorum. Various methods were tried to overcome this trouble, but without any great success. Then the earlier method adopted in Virginia, which had long prevailed in England, of appointing certain of the justices to be of the quorum, was again revived in the colony, and with it a prescribed number to constitute a full court.

The object of this was not, primarily, to secure a full attendance, although it tended to produce that result, for those chosen for the quorum took pride in their selection, and were, moreover, men with a high sense of duty; but the chief reason for this plan was to secure from the whole number of justices those best fitted to perform the duties of the court. So long as the court practically filled its own vacancies this same object was best accomplished, but, naturally, when all came to be elected by a miscellaneous crowd of voters

¹*Ante* 73.

for almost any other reason than peculiar fitness, there was not much choice between the chosen. The real wonder is that the result was not much worse than it actually became.

The County Court through most of its history was held monthly at the courthouse of the county, but after a while four of its terms were set aside for jury trials, and called quarterly terms.

The County Court was the counterpart of the quarter sessions in England,¹ and through all its history, so long as it was held by justices of the peace, was the "folkmete, the General Assembly of the people of the County."² Its jurisdiction was not simply judicial, for it had legislative, and to some extent, executive functions. It was moreover the fiscal agent of the county, and levied and directed the disbursements of the local taxes. It superintended the construction and maintenance of roads, built and repaired bridges,³ and cared for the public buildings, the courthouses, jails, etc. It had the power of appointment of some of the minor officers, such as constables, and, at one time, of the sheriff. The justices could act as coroners, and small suits could be tried by a single justice.⁴

Among the numerous duties of the court was the licensing of taverns and tippling places; the auditing, and allowance of the payment of claims against the county; and even dues against the colonial government were examined by it, and its conclusions certified to the General Assembly.⁵

These courts had, moreover, jurisdiction for the trial of both criminal and civil cases, the latter both

¹Old Virginia and Her Neighbors. Vol. II, 38.

²Address of Holmes Conrad. Virginia State Bar Association R. 1908. Vol. XXI, 328.

³Old Virginia and Her Neighbors. Vol. II, 39.

⁴*Id.* Justice in Colonial Virginia, 81.

⁵*Id.*, 92.

at law and in equity. The act of March, 1623-24, which established the monthly courts, gave them the right to decide controversies not exceeding the value of one hundred pounds of tobacco, and to punish petty offenses, but with the right of appeal to the Governor and council. Within ten years the maximum was increased to five pounds sterling, then to ten, and then to sixteen pounds sterling; and in 1642-43, by the same act which changed the name from Monthly to County Courts, the maximum of jurisdiction was put at twenty pounds sterling or two hundred pounds of tobacco. Finally there ceased to be a maximum limit, and the courts had jurisdiction of any civil cause wherein the matter involved was of a value of as much as twenty shillings.¹

The Common Law procedure prevailed in the County Courts, and so of the forms of chancery pleadings, for in 1645² it was "thought fit and accordingly enacted, that all causes of what value soever between party and party shall be tryed in the countie court by verdict of a jurie, if either party shall desire it, which jurors shall be chosen of the most able men of the county who shall, of course, be empannelled by the Sheriff for that purpose; but if the defendant before the hearing of the cause shall desire releife in equity, and to be heard in way of chancery, then the proceedings by way of jury at common law shall be stayed vntil the other party have answered the particulars of his petition vpon oath and the cause heard accordingly; vpon which hearing, The Commissioners shall either proceed to make a final end or decree in the said cause, or else, finding no such cause of releife in equitie as was pretended,

¹III, Hening, 507.

²I, Hening, 303.

then to remit the cause back again to be tryed by a jury as aforesaid."

But in the nature of things, such a court could not be expected to know or to decide intricate points of special pleading, or to require very much formality in proceedings in equity. And they did this neither of the pleadings nor of the orders which they entered declaring their decisions. Indeed, it came about that complaint was made of the looseness and extreme lack of formality in the court, so that, in the time of Governor Nicholson, instructions¹ came from England that he was "to take care that no court of judicature be adjourned but upon good grounds, and, whereas, complaint has been made that the orders of court are entered in the absence of the magistrates, and some times pend in private at the Magistrates' house, you are to take care to prevent the said abuses, and particularly that no order of any court of judicature be entered or allowed, which shall not be first read and approved by the magistrates in open court."²

The presiding justice announced the rulings and decisions of the court, which, as in the General Court, were reached by a majority vote of the justices present.³

Petit juries were selected at one time from the bystanders, and arbitrarily without a panel, but later were regularly chosen from those qualified⁴ and summoned by the sheriff. As has been noticed, the law of 1642 gave the right of trial by jury in criminal cases, and the same law required them "to keep from

¹Virginia Magazine. Vol. IV, 51.

²This same Governor Nicholson finding that the justices were neglectful about attending the courts, and that this caused much inconvenient and expensive delay, by a proclamation, issued in 1711, prodded them sharply. Virginia Magazine. Vol. VIII, 193.

³Justice in Colonial Virginia, 83

⁴They must have possessed property of the value of fifty pounds III, Hening 176, 370.

food and releife till they have agreed vpon their verdict."

After some vacillation in the law, the grand jury became a fixed institution and was required to attend at two of the terms of court annually.¹

The criminal jurisdiction of the County Courts was, except for a short interval, limited to cases not involving life or limb; and the law required all cases "that concern life or member"² to be sent to the General Court. But this still left to the County Court the exercise of much ingenuity in the selection of punishments. Fines, stripes, ducking, the stocks, the pillory, lying neck and heels together at the church door, doing penance by making confession while standing on stools in the church with white sheets over them,—these and like devices made up to the courts the power denied them over life and limb.³

Over negroes and runaway and incorrigible slaves a large power was given to the County Courts, and in such cases, later confined to rape of white women, the penalty of castration could be inflicted.⁴

In the very early times the Governor had the right to appoint the clerks of the County Courts,⁵ but later⁶ this power was given to the County Courts themselves, provided, however, that they should not remove, "without manifest cause proved against him," any clerk holding office at the time of the act.

They had previously been appointed by the secretary of state and were regarded as his deputies, so when the appointing power was changed, their fees, which had

¹Justice in Colonial Virginia, 85. English Colonies in America, 49.

²I, Hening, 398, 477.

³Justice in Colonial Virginia, 89.

⁴*Id.*, 98.

⁵I, Hening, 305.

⁶*Id.*, 448.

been fixed by acts of the assembly,¹ remained charged with the amounts which they had formerly been compelled to pay to the secretary.² But the rule of appointment was again changed and given back to the secretary, who continued to have this right, in spite of efforts to take it from him, during the rest of the colonial period.³

It was an office of much importance and very considerable revenue was derived from it.⁴ The appointees were usually men of high character and standing in the community, and "upon no official in the entire county was imposed the performance of more important functions, of whom was required the exercise of so many virtues, or who were more distinguished for the endowments of mind and heart than was the Virginia clerk, then called Clarke."⁵

Nor was this characteristic of the county clerk confined to the very early times and only while they were appointed to the office. The reputation of the old clerks gave character to the office long after it became the sport of popular elections, and much the same class of men were chosen for many years after the new system was adopted. Once chosen they remained in office all their lives,⁶ and in many cases public opinion seemed to regard the place as hereditary, for it was not uncommon for a worthy son to succeed his worthy sire.

The lawyers, too, who confined their practice to the County Courts, after the period when the class of pettifoggers who had disgraced the earlier annals of

¹I, Hening, 266. Changed later. *Id.*, 464. Sheriffs' fees fixed by the same acts.

²I, Hening, 449.

³Justice in Colonial Virginia, 114.

⁴*Id.*, 114.

⁵Address of Judge Waller R. Staples. Virginia Bar Association, 1894. Vol. VII, 144.

⁶And holding the office seemed conducive to longevity. Judge W. R. Staples' address. Virginia Bar Association R. Vol. VII, 145.

the court had ceased to be, became themselves an interesting feature in the history of the court. Most of them had never been college students, and but few of them had ever heard a law lecture. Their knowledge of the law had been obtained from reading for a year or two in the office of some old lawyer, and in seeing the practical application of their reading in the County Courts. They studied principles, men, and human nature more than cases, and their personal acquaintance was the population of the county. But yet they were ready for discussions of politics, religion, and philosophy, and their homes being as open as their offices to their clients, the necessary business having been transacted, the place for further talk became the lawyer's fireside, where all the family could take part in the discussions. The home and the office, with such absences as were required by the part often taken in public affairs, made up the lives of the County Court lawyer.

This sketch, from the pen of a distinguished Virginia writer,¹ makes a very attractive picture of this class of practitioners:

"He learned to accept Lord Coke's dictum, '*Melior est petere fontes, quam sectari rivulos*;' to look to the sources rather than to tap the streams; he fed upon the strong meat of the institutes and the commentaries with the great leading cases which stand now as principles; he received by absorption the traditions of the profession. On these, like a healthy child, he grew strong without taking note. Thus in due time when his work came he was fully equipped. His old tutor had not only taught him law, he had taught him that the law was a science and a great, if not the greatest, science. . . . He married early and for

¹Thomas Nelson Page. Virginia Bar Association R. Vol. IV, 213.

love the daughter of a gentleman, very likely the old lawyer with whom he had read law, perhaps a beauty and a belle who, with many suitors, chose the young lawyer whom older men were beginning to speak of, and younger men were already following: . . . and who could cope with her father or disdainfully destroy a younger disputant. He took her to live on some poor plantation, in an old house which stood amid great oaks and hickories, with scanty furniture and a few luxuries, yet which, under their joint influence, became an old Virginia home, and a centre of hospitality and refinement. Here he *lived*, not merely had his being, a machine or part of a machine, but lived, and what a life it was. The body fed and kept in health; the soul free from vice and debasement, dwelling in constant intercourse with a beautiful being; in communion, if not with God, at least with his two chief ministers — nature, and a gracious, gentle and pure woman; the intellect nourished by association with a pure spirit, by contact with the best thoughts of ancient and modern times, and by constant and philosophic reflection. The world prospered; friends surrounded him; young children with their mother's eyes came and played about his feet, with joyous voices making his heart content. Thus he grew, his circle ever widening as the circle of our horizon widens as we climb towards Heaven. These were some of the influences which created him. . . . His professional life once begun, went on. The law is an enlistment for life, and the battle is ever in array. No client who appeared with the requisite certificate of clientage was ever refused. There was no picking and choosing. The old lawyer was a sworn officer of the court, a constituent element of the great judicial system of the country. Whoever wanted legal advice, and applied to him

for it, was entitled to and received it. From that moment the relation of counsel and client began. It was a sacred relation. His clients were his 'Clients' in the good old original sense of the term. They were not merely persons who came into an office and bought and paid for so much professional service; they were his clients, who confided in his protection, and received it. . . . Every power and every resource were devoted to his service. No time was too precious to be spent, no labor too arduous to be endured in his behalf. Body, mind and soul, his counsel had flung himself into his cause; guided by his professional instinct, spurred by his professional pride, he identified himself with his client's cause, ready to live for it, fight for it, and, if necessary, even die for it. Public opinion had nothing to do with his undertaking a case. He thought but of his profession. He would, if applied to, defend a client whom, if not applied to, he would willingly have hung. Once in a case, he never gave up; if possible he carried it on to success, or if he were defeated he expended every intellectual resource in trying to recover; he was ready to move for new trials, to appeal, to apply for rehearings, and if at end he were still unsuccessful, he went down damning every one opposed to him,—counsel, client and bench, as a parcel of fools, who did not know the law when he put it under their very noses. No wonder that the clients regarded their counsel with such veneration."¹

¹It must not be supposed that this fine old class of lawyers, known specifically as the County Court Lawyers, alone practised there. Judge W. R. Staples in his address already quoted from, says: "The alert lawyers of the state attended the County Court. There the retainers were obtained, and there preparation was made for the trial of cases in the Circuit Courts; for after those Courts were established, in the progress of time, most of the important litigation was carried on in those forums. I do not hesitate to say, from all that I have seen and heard, that some of the finest displays ever made before any judicial tribunal in Virginia have been made in the County Courts. No rigid rules were enforced, or technicalities observed, and there were frequent opportunities afforded for the display of all the arts of the advocate, as well as the powers of the logician."

Nor is it to be wondered that a combination of justices so selected from the best material among the people, although not learned in the law, of clerks whose ability and character gave tone and dignity to the court, and of lawyers of such zeal and unselfish devotion to the causes of their clients, made of the County Court the remarkable institution that it was. Its assemblage each month, and more especially at the quarterly sessions, when jury trials were to be had, and at the one term set apart each year for a round-up of the fiscal affairs of the county, when the whole bench of magistrates sat in council,—was the sign for the gathering of the people from every part of the county. To that day the conclusions of bargains previously begun were set to be finished; sales of land, effected between the terms, were perfected by deed and payments, or much more usually by bonds secured on the land; payments of debts long past due were made, as the end of forbearance was promised to be reached on “next Court day;” horse trading was lively and interesting; public sales of land or personalty took place according to advertisement, “in front of the Court House,” and the voice of the crier announced all the day, the amount of the last and highest bid. One who himself¹ in his younger days saw the County Court day at its full tide, almost as it had come down from colonial times, gives this vivid description of it:

“At a very early period, as far back as tradition or historical sketch carries us, County Court Day has been a day of interest to the people of Virginia. Generally it brought forth all classes and conditions of society. The farmer came to exchange his commodities for the goods of the merchant, to settle his taxes, and to

¹Judge Waller R. Staples. Virginia State Bar Association R. Vol. VII, 148.

hear discussed the current topics of the day. The rich and aristocratic planter was on hand, mingling freely with his less pretentious neighbors. There was to be seen the Jew, with his pack of cheap jewelry carried about on horse-back; and there, too, was the ubiquitous Yankee pedlar, with his clocks and showy goods spread out in gorgeous array on temporary counters in the court-yard.

"Ever present when an office was in view was the smiling and indefatigable candidate, proud and happy to grasp the hand of the bone and sinew of the land—the horny-handed sons of toil. It was a great day in most of the mountain counties for the county bully to exhibit himself to his admirers, eager for the fray which was to settle the question of county championship. I can recall many an afternoon of County Court Day when the younger members of the profession collected on the tavern porches to witness the battle of the giants, tall, athletic fellows, who stood up and beat each other on the face and on the breast with resounding blows to the great delight of the spectators. A ring was generally formed around the combatants. A screaming, shouting multitude of angry men surged to and fro, and cheered on their respective champions, who were never parted or interfered with until one of them acknowledged defeat. No foul playing was allowed, no weapons used except what God and nature had furnished. As a general rule the victor had himself but little to boast of, as was apparent from his bloody and bruised face and his torn and tattered garments, when led forth in triumph by his followers. But the glory of the County Court was when the court-house was converted into a political arena for the contest of the party champions. . . ."

In spite of some of the objectionable features of the

County Court, both in the court and on the green,¹ it is not to be wondered that when in the Constitutional Convention of 1829-30 an effort was made to abolish it, it was defeated by the influence of such men as Chief Justice Marshall, Benjamin Watkins Leigh, John Randolph of Roanoke, Philip B. Barbour, Chapman Johnson, and others of their class.

But a sickening blow was given the system by the Convention of 1849, when the justices who composed the court were required to be chosen by popular election, and as Judge Waller R. Staples says,² "it finally passed out of existence under the operation of the Constitution of 1869," for although a court by the same name continued until the Convention of 1904, yet after 1869 it ceased to be held by justices of the peace and was in every one of the hundred counties of the state presided over by a poorly paid judge, "learned in the law."

The system died with the justices, and its resurrection, even if desirable under any system of popular election, is made impossible where that element of Virginia voters imposed upon the state by the mandates of the Fifteenth Amendment of the Federal Constitution, can take an influential part.

It is not much to be wondered that some, animated by the memory of such an institution and its effect upon the people under earlier existing conditions, should dream of and even advocate the restoration of the County Court as it once existed. But the thing itself, as it was, could never be again, without its then environment. That condition can no more be replaced than the vanished hours of yesterday can be restored, or

¹At one time every court-house was required by law to have around it a certain large space, covered with grass and shaded by trees.

²Virginia State Bar Association R. Vol. IV, 147.

the dead revived. The County Court system, as it was, can live only as a happy memory, in honor of which it must ever delight the children of Virginia to erect such monuments as now exist in the classic addresses from which I have quoted.

The chief colonial court, however, was the General Court, for it had all the original jurisdiction in civil cases that belonged to the County Court; more than that, jurisdiction in criminal matters; and was given, besides, appellate jurisdiction from the decisions of the County Court; and, indeed, after that right was taken from the General Assembly, it was the only Court of Appeals under the *Colonial* system¹. And like the County Court, it, too, had no lawyers on its bench.²

We have already seen that the first governmental agency in the colony was the council, and that this body had also judicial functions.³ Out of this, after governors also were provided for, grew the Quarter Court, composed of the Governor and council, and the name of which was changed to "General Court" after it ceased to hold quarterly sessions.⁴

The act of the General Assembly which changed the name, fixed also the times for the sessions of the court, March 20th, if not Saturday or Sunday, and if so the Monday following, and September and November 20th, subject to the same exceptions. The March term was to continue eighteen days, not counting Sundays, and the September and November term twelve days each. By the same act the order of procedure was prescribed and forms given for the manner of opening the court, for commanding silence by the

¹Not meaning, of course, to include the right of appeal to England, from the General Court itself. *Ante* page 64.

²This was all changed after the Revolution.

³*Ante*, Chapter IV.

⁴II, Hening, 58.

crier, for summoning suitors to appear, and for calling respectively the plaintiff and defendant.¹ But all this was long after the beginning of this important court, which for thirty years before this time had been called the Quarter Court,² as the name had, from the commencement, been given to the four general sessions of the London Company.³

At the session of the General Assembly which began on April 16, 1684,⁴ the terms of the court were reduced to two, to commence April 15 and October 15 in each year, unless those days should happen to fall on Sunday, in which event the session was to begin on the day following. There was a time, however, after the expiration of the first or oligarchical council, when the Governor alone exercised judicial functions, and the exact date at which the Governor and council first sat as a court seems not to be definitely fixed,⁵ for there was also a time when they sat at different times as a Court of Justice and as a Council of State.⁶ The place of session, we have seen, was at first at Jamestown, after that at Williamsburg during the remainder of the colonial period, and after that the newly constituted court held its sessions at Richmond.

The number of members of the General Court varied, at first thirteen, and then as many as nineteen, and at one time nine, but in 1671 the number was reduced to sixteen, and in 1680 to fifteen. And by the act of 1705⁷ it was provided that the court should "consist

¹II, Hening, 59.

²I, Hening, 174, 187.

³Address of F. H. McGuire. Virginia State Bar Association R. Vol. VIII, 197

⁴III, Hening, 289. The length of the sessions had by former acts been extended to a maximum of twenty days, but this limit was not strictly regarded by the court. Justice in Colonial Virginia, 36.

⁵Justice in Colonial Virginia, 33.

⁶*Id.*

⁷III, Hening, 288. Address of F. H. McGuire. Virginia State Bar Association R. Vol VIII, 199.

of her Magisty's governor, or commander in chief, and the council for the time being, any five of them to be a quorum."

During the times of the cases reported by Randolph and Barradall the number of councilors, so far as they are there stated, sitting at the hearings varied from seven to eleven, the average number being about eight. The councilors constituting the court in 1714¹ were Robert Carter,² James Blair,³ Philip Ludwell,⁴ John Smith, John Lewis,⁵ William Byrd,⁶ William Cocke,⁷

¹Virginia Magazine. Vol. II, 2.

²Son of the second son of Col. John Carter, and from his extensive landed possessions, and somewhat dogmatic disposition, was known as "King Carter" (Virginia Magazine. Vol. IV, 364). Being the president of the council he became, on the death of Governor Drysdale, on July 22, 1726, the acting Governor, and so continued until between August 17th and October, 1727, when Sir Wm. Gooch was made Governor. (Spotswood's Letters. Vol. II, 45.) He was the father of Col. Robert Carter of "Nomini," who himself became a councilor, and of whom, and of his family, we have had attractive pictures from the diary of Philip Vickers Fithian. (Ante Chapter X, page 80.) John Carter, the eldest son of "King Carter," married the daughter of a lady who had had six husbands. Apropos of the disposition of people in colonial times to marry frequently and at short intervals, it is noted by one of the commentators that it was not an unusual thing for the new husband to submit for probate the will of his predecessor, so freshly cooked were the funeral baked meats.

³He was the famous commissary, and held his place as councilor by virtue of his office of Deputy Bishop.

⁴He was the son of that Col. Philip Ludwell (all councilors were colonels, holding that rank as *ex-officio* commanders of the militia) who figured so conspicuously in public affairs in connection with Governor Berkeley, and who afterwards married his pretty widow. But this Philip Ludwell's mother was the first wife, who had herself been twice a widow before she married Col. Philip Ludwell. This councilor of 1714 was born on February 4, 1672, and died January 11, 1726-27, and has appeared already in this narrative in connection with the advowson quarrel between Governor Francis Nicholson and the Vestry of Bruton Parish. (Ante Chapter V, page 93.)

⁵He was of "Warner Hall" Gloucester County, was born in 1669 and died in 1725. He married Elizabeth Warner, by whom he acquired the estate so named. Virginia Magazine. Vol. IV, 367.

⁶The second of the name, of Westover, and was the owner of a library of three thousand six hundred and twenty-five volumes of books, and was a man of much literary culture. He differed with Governor Spotswood on the subject of collecting the public revenues, and the Governor wrote lengthy "observations" in reply, and in turn preferred charges against Col. Byrd who was the auditor of the colony. (Spotswood's Letters. Vol. II, 176 *et seq.*) Their relations seem, however, to have remained friendly, as appears from the visit of Col. Byrd to the Spotswood family at Germania, of which he wrote such an interesting account. (Ante Chapter V, page 103.) Col. Byrd was born at Westover, March 16, 1674, and died there August 26, 1744. As to the quarrel between Col. Byrd and Governor Spotswood see the introduction to the Writings of Col. William Byrd-Bassett.

⁷He was doctor and secretary of the colony, as well as a councilor. He died suddenly October 22, 1720, of apoplexy, while on the bench of the General Court

Nathaniel Harrison,¹ Mathew Page² and Robert Porteus.³ The councilors sitting from time to time in the cases reported by Randolph and Barradall, so far as their names appear, as they only do in cases where the court was divided in opinion, were Thomas Lee,⁴ John Tayloe,⁵ Philip Lightfoot,⁶ John Custis,⁷ Cole Diggs,⁸

(Spotswood's Letters. Vol. II, 345.) His elaborate epitaph is on a tablet in Bruton Church, Williamsburg. ("Bruton Church," 89.) Some part of his family history is given in a note to pages 8, 9, Vol. II, Spotswood's Letters, where it is also mentioned that his widow married "Col. John Holloway, an eminent lawyer of Williamsburg."

¹He was also auditor of the colony and died about 1737. He seems to have been a brother of the Benjamin Harrison who was the father of the Benjamin who was one of the signers of the Declaration of Independence, and among whose descendants have been two presidents of the United States.

²The three last named of the councilors in the list of 1714, were all appointed at the same time. (Spotswood's Letters. Vol. II, 54.) Mann Page was a son of Mathew, and grandson of John Page of Middlesex, England, who was the "immigrant." He was born in 1691, and died January 24, 1730; was the builder of "Rosewell," and his second wife was Judith, daughter of "King Carter," whom he married in 1718. Governor John Page was among the issue of this marriage. (Spotswood's Letters. Vol. II, 54. Virginia Magazine. Vol. IV, 365.)

³He was a native of Gloucester County, but went to England and died there. In Ripon Cathedral, on the wall of the south aisle of the choir, is an inscription which recites that his remains are buried near by: tells of his public services in Virginia, that he removed to England and resided first at York and then at Ripon, where he died, August 8, 1758, aged seventy-nine years. He is said to have been the father of the learned Porteus, Bishop of London, and whose niece, Lucy Grymes, was the grandmother of General Robert E. Lee. (Spotswood's Letters. Vol. II, 54.) While these three last named members of the council were judges of the General Court, John Holloway was judge of the Vice Admiralty Court, and John Clayton, afterwards attorney-general, and at whose death Edward Barradall succeeded to that office, was advocate.

⁴He was the third son of Richard Lee the "immigrant," and was the builder of Stratford, the birthplace of Gen. Robert E. Lee; was for many years president of the council, and just before his death in 1750 was appointed Royal Governor of Virginia. He was the father of Richard Henry Lee and Francis Lightfoot Lee, whose mother was Harriet, daughter of Col. Philip Ludwell of Green Spring (Berkeley's old place), near Williamsburg.

⁵Of "Mt. Airy," married the daughter of David Guyn, and his daughter, Ann Corbin, married Mann Page, who was the son of Mann and Judith (Carter) Page. She was his second wife and the mother of Mann Page of "Mannsfield," who was a member of the Continental Congress. (Virginia Magazine. Vol. V, 417.)

⁶Of "Teadington" Middlesex County; son of Philip Lightfoot the "immigrant," and married Alice, daughter of Henry Corbin.

⁷Son of John Custis of "Arlington," an estate on the eastern shore of Virginia. He moved to Williamsburg and married the daughter of Col. Daniel Parke, and was the father of the first husband of Mrs. George Washington. (Spotswood's Letters. Vol. I, 80.) His father was appointed a member of the council in 1704, and died in 1713. (Spotswood's Letters. Vol. II, 58.)

⁸Son of Edward Diggs who had been president of the council and acting Governor in 1655-56. Cole Diggs was appointed to the council in 1724. (Spotswood's Letters. Vol. I, 63.) His daughter married Nathaniel Harrison, who was also a councilor. He became president of the council, and his son Edward also filled the same office. Col. William Byrd wrote a flattering tribute to him. (Spotswood's Letters. Vol. II, 304.)

William Robinson,¹ Robert Carter,² John Grymes³ William Byrd,⁴ James Blair,⁵ William Randolph,⁶ and William Dandridge.⁷

The councilors after the time of the London Company, were appointed by the King and were chosen for their intelligence and standing in the community,⁸ and vacancies occurring in their number are said by Mr. Chitwood⁹ to have been usually filled in the following manner: "The Governor would select such men as he deemed suitable for the office and would send

¹He is said to have been sheriff of Richmond County in 1708, and County Lieutenant in 1715. (Virginia Magazine. Vol. IV, 359.) He married Agatha Beverly, February 17, 1737. (Virginia Magazine. Vol. IV, 198.)

²He was son of Robert ("King") Carter and president of the council and acting Governor. (Virginia Magazine. Vol. III, 355.) He was the father of Robert Carter of "Nomini Hall," of whom much has been said in connection with the diary of Fithian. He (Robert of "Nomini") also became a councilor in 1758, and after the Revolution moved to Baltimore, and died there March 4, 1804. (Virginia Magazine. Vol. IX, 358.) See a sketch of his family, Virginia Magazine. Vol. VI, 88.

³Of "Brandon" Middlesex; was also receiver-general, and married a daughter of Philip Ludwell.

⁴He has been noticed in the list of councilors of 1714, and being one of the few men in public life, in colonial times, who reached a moderately old age, he was for many years a member of the General Court.

⁵He was the commissary, and lived until 1743.

⁶Eldest son of William Randolph of Turkey Island, and brother of Sir John Randolph, the writer of the reports. He was also the treasurer of the colony in 1737, the councilors never being diffident about holding two or more offices at the same time.

⁷Brother of John Dandridge, the father of Mrs. Washington. He was also one of the commissioners, with Col. William Byrd and Richard Fitzwilliams, who in 1728 finally determined the eastern portion of the boundary line between Virginia and North Carolina.

These are all the judges mentioned in the Barradall and Randolph reports as being members of the General Court, and as sitting in the cases reported in this book. None of them were lawyers, but all of them were men of education and character, and they sustained the high standing of the court, perhaps better adapted to the conditions of that time than a bench of learned lawyers would have been. Still it seems strange that the great amount of legal learning and purely technical arguments that appear in the speeches of counsel engaged in the trial of these cases, should have been so persistently addressed to such a body of men, or that they should, with uncomplaining patience, have listened to much that was said which could have conveyed no more ideas to them than if it had been spoken in an unknown tongue.

Col. William Byrd, though never admitted to the bar, and who was quite caustic in his comments upon lawyers generally, studied law during his long stay in England. Many of the councilors had in their libraries some law books, but to them their superficial acquirements in the science of the law could only have been the *little learning* which is a dangerous thing.

⁸Life of Patrick Henry. Vol. I, 35.

⁹Justice in Colonial Virginia, 38.

in their names, together with an account of their qualifications, to the intermediate board; when the list recommended had received the sanction of this board, it was passed on to the King, whose formal approval was necessary to make the appointment legal. Councilors were not chosen for any definite period, but were commissioned whenever a new Governor was sent to the colony, or a new King came to the throne. The old councilors, however, were usually continued in office by the new commissions, and in practice, therefore, it resulted that the judges of the General Court held office for life." To prevent the delay, however, which would necessarily result from this red tape system, it was the practice, whenever vacancies occurred, to send in the names of persons to fill them, and at the same time for the governors to appoint them temporarily to the position. These appointments, when confirmed by the King would become permanent. The Governor had also the right to suspend councilors for just cause, but had to report to England the reasons for doing so, with proof of his charges.¹

This power in the Governor's hands seems not, as it well might have done, to have given him despotic control over the council. Indeed, as we have seen, especially in the contests between Commissary Blair and several of the governors, the Governor had more reason to fear the councilors than they him, and this condition continued up to the time of the Revolution being a most valuable factor in the cause of independence.²

But during the commonwealth, or interregnum period, as we have seen,³ governors and councilors

¹Justice in Colonial Virginia, 39.

²Writings of William Byrd, LIII.

³*Ante* Chapter IV, page 69.

were elected by the House of Burgesses. At first the councilors received no pay for their services, but in 1640¹ a certain exemption from taxes and dues was allowed.

By the act of March 31, 1658,² a former allowance, the date of which is not given, of two hundred pounds for "accommodation at quarter courts and Assemblies" was rescinded; but later salaries were allowed, and in 1755 "the service of the councilors were rewarded with more than twelve hundred pounds a year,"³ and with other emoluments, such as buying at a low price all the quit rents due the King, and, if that could be called an "emolument," they usually commanded the militia of their respective counties, with the rank of colonel.⁴

The Quarter Courts in their early days seem in their proceedings to have followed the instructions given by King James to his first adventurers,⁵ which were that the judicial proceedings "shall be made and done summarily, and verbally without writing, until it comes to the judgment or sentence, and yet, nevertheless, our will and pleasure is that every judgment and sentence hereafter to be given in any of the causes aforesaid, or in any other of the said several presidents and counsellors, or in the greater number of them, within their several limits and precincts, shall be briefly and summarily registered into a book, to be kept for that purpose, together with the cause for which the said judgment or sentence was given; and that the said judgment and sentence so registered and written shall be subscribed with the hands or names of the

¹I, Henning, 228, 445.

²*Id.*, 498.

³Justice in Colonial Virginia, 44.

⁴*Id.*

⁵I, Henning, 71.

said president and council, or such of them as gave the judgment or sentence."

But after many years trial of this informal mode of procedure it was, in June, 1642,¹ declared by the General Assembly that "for want of due forms not before sett downe, for issuing of writs and returns thereof for the proceedings of the quarter Courts of the colloney, in case of defaults of Sheriffs and non-appearance of plts and defts, which occasioned much trouble to the government, and great charge of inhabitants of the collony," quite strict requirements were exacted as to the issuing and return of writs, their forms, the time to appear for appeals from the Monthly to the Quarter Courts, etc. These provisions affecting the forms of procedure were also changed and generally improved from time to time,² until, as we have seen, in 1661-62 the courts were required to be conducted with much ceremony.³

By the same act the answer or plea to a declaration was required to be filed in writing; the judgment, if for the plaintiff, to be entered on the declaration, or if for the defendant, on the answer, and the evidence to be filed together with the other papers, and carefully preserved by the clerk.

By a further act of the same session the number of sessions for each day was fixed, the court was required to sit from eight o'clock to eleven in the forenoon, and from one to three in the afternoon, and to avoid errors in the entering of orders by the clerk it was required that "all orders of the day be by the Clerk drawne up against next morning, and then read in open court (in presence of the plaintiff

¹I, Hening, 270.

²Act of 1657-58. I, Hening, 461

³The form of opening the court — "Oyes, Oyes, Oyes, silence is commanded," etc., as at present used, was first *required* by the act of 1661-62. II, Hening, 59.

or defendant if they will be present) where rule will be given by the court for amendment of errors, if any be, before they be entered upon record, and the plaintiff or defendant if they have any new matter of plea, shall then have liberty to plead it in arrest of judgment. And the orders thus publicly read and confirmed shall be signed by the secretary which shall remaine upon file in his office for the full justification of the Clerke who is to enter them in the books of records."

This revision, or, as it is called, "the body of the law now digested into one body,"¹ covers eighty-nine pages of the statutes at large, and containing as it did many new provisions and rules of procedure, and the collection of many scattered acts into one fairly compact code, must have been of very great value to the lawyers of that time and of the succeeding years, and have contributed greatly to the order and regularity of the court proceedings. And these rules of procedure, thus reduced to a fairly well ordered system of practice, continued substantially in force during the whole life of the court in the colonial period.

The destruction by fire on April 3, 1865, at the time of the Confederate evacuation of Richmond, of the Virginia General Courthouse with all its valuable contents, was an irreparable loss to lovers of antiquarian research. Fortunately the indefatigable industry of Mr. Conway Robinson in having, previously to the fire, extracted from the book marked "No. I, 1639-1642," a number of the entries in the order book of the court between those dates, affords us an opportunity of understanding the character of business conducted by the council at that period of its existence, and the style and form in which the records of its proceedings

were made.¹ But these proceedings were of the council before it attained its separate and distinct function of a court, and, interesting as they are, they are much more of an executive than of a judicial character.

The jurisdiction of the court was original and appellate, at common law and in chancery, civil and criminal; and trials were had before it with and without juries, although the right of trial by jury was given by the statute, when demanded. The penalties imposed by the court in criminal cases were very much the same as those inflicted by the County Courts, of which we have already said something.

Of the general character of the decisions of this court, composed as it was only of laymen, this comment by Mr. Chitwood² seems to be a very just description: "While the General Court doubtless tried to conform its decisions to the laws of England, yet it was impossible to fit the judicial business of the colony into exactly the same mold into which that of the mother country had been cast. A certain amount of elasticity had to be given to the laws of England before they could be adapted to the differing conditions in Virginia. Besides, a legal education was not a requisite qualification for membership in the council, and so cases must sometimes have arisen in which the judges did not know how to apply the common law. Then, too, during the greater part of the seventeenth century, the legal profession maintained with difficulty its existence in the face of the opposition which it encountered from the assembly, and therefore, the judges for most of those times were without legal advice from professional attorneys as to the proper interpretation

¹These are printed on pages 361-368, Vol. V, and on pages 277-283, Vol. XI, Virginia Magazine. Other extracts from the proceedings of this council (1626-1628, 1641-1682) are to be found in Vols. IV and IX of the Virginia Magazine.

2. Justice in Colonial Virginia, 51.

of laws and precedents. The Virginia statutes did not, of course, cover all the offenses of which the court took cognizance, consequently, and especially in the early years, it had to rely mainly on its own originality in rendering decisions."

But during the early part of the eighteenth century very different conditions prevailed. Most of the lawyers who practised in the first half of that century had been educated in England, were taught in the Temple and at Gray's Inn, and even when (as some of them did) they only studied in the offices of lawyers in the country of England, they were taught the common law and the principles of equity, and were especially well grounded in the rules of practice and of special pleading.

The arguments, therefore, which make up the chief part of the cases reported in this book, show a degree of learning in these respects seldom equaled by the lawyers of the present day. As the courts gave no written opinions, except occasional very brief notes, they never referred to the principles and rules of practice so elaborately argued before them. Being not learned in these matters, although they were generally highly educated men, after reading one of the elaborate arguments of Barradall or Randolph one can but wonder what impressions these learned dissertations upon technical rules of pleading and evidence made upon those councilors; whether they did not as much weary in listening to them as the writer confesses he did in reading them, and if, after all, they carried any clearer ideas to the minds of King Carter, Commissary Blair, Councilors Ludwell, Byrd, Harri-son, etc., than if they had been addressed to them in the language of the Mandarins.

These two courts, the County and the General Court,

were the great tribunals of the country, and the latter, after the General Assembly lost its judicial functions, was the highest and last resort in the colony, and subject only to appeals to England. Besides these courts there were three others of limited jurisdiction, the Hustings Court of Williamsburg, the Court of Oyer and Terminer, and the Vice Admiralty Court. To complete the narrative these need brief notice.

In anticipation of the establishment of Hustings Courts the General Assembly, by an act passed in October, 1705,¹ declared that whenever any such court should be established in any of the burghs, to be constituted under that act, no inhabitant of such burghs should thereafter "be held to plead or go to court for any summons or law business without the burgh, except in local actions, when the cause shall arise without the jurisdiction of such town, or when the thing in demand shall exceed thirty pounds sterling, or in the generall court or to bear evidence in some court as the laws of this country direct neither shall they be forced to serve on a jury in any court without such burgh, except in the generall court."²

The letter patent from the King which bore the date of July 28, 1722,³ which incorporated the city,⁴ constituted the "maior," recorder and aldermen, of whom there were six, and their successors, or any four or more of them—"of which the said maior, recorder, or the last preceding maior shall be one"—a Court of Hustings to sit once a month in the city. This court was given jurisdiction in cases of trespass and ejectment, writs of dower, and all other actions

¹III, Hening, 407.

²The title of this act was, "An act for establishing ports and towns," and this provision for a court was one of the encouragements offered for the promotion of such towns.

³IV, Hening, 139.

⁴Williamsburg.

"personal and mixt" arising within the city. It could give judgment and award execution according to the laws and statutes of England and the colony, for a maximum sum of twenty pounds current money, or four thousand pounds of tobacco.

The right to grant licenses to, and to control ordinaries and public houses, was given to this court, with jurisdiction also to hear and determine all complaints of masters, servants and apprentices in the city, in the same manner as the courts of York and James City Counties, the lines of which counties ran through the middle of the town.

Both these counties were obliged¹ to pay the expenses of the sergeant of the city, the clerk of the Court of Hustings, and the constable of the city, in connection with the arrest and maintenance of prisoners in the parts of the town which lay in their counties respectively. When by the act of August, 1736,² a Court of Hustings was also established for the burgh of Norfolk, and its jurisdiction defined, the jurisdiction of the Williamsburg Court was by the same act extended so as to be equal to that of any County Court, and the power and authority given to justices of the peace were conferred upon the mayor, recorder and aldermen of the city of Williamsburg.

Courts of Oyer and Terminer, on special commission, had been held in Virginia before the permanent establishment of this court, and Fiske³ gives an interesting account of the case of one Talbot brought by force from Maryland for trial in Virginia on account of a murder committed in the first named colony. A dispute as to the jurisdiction naturally arose, and being

¹IV, Hening. 447.

²*Id.*, 541.

³Old Virginia and Her Neighbors. Vol. II, 158.

referred to England it was there ordered that a special commission of Oyer and Terminer be sent to Virginia for this trial. But while the decision tarried, Talbot's wife and two of his trusty followers availed themselves of the delay and of the cover of a dark winter night to get him out of jail and take him back to Maryland. "For the sake of appearances," says Mr. Fiske, "his friends in the Maryland Council thought it necessary to proclaim the hue and cry after him, and there is a local tradition that he was for a while obliged to hide in a cave, where a couple of his trained hawks kept him alive by fetching him game,— canvasback ducks, perhaps, and terrapin — from the river." But he was brought back to Virginia, tried there before the General Court acting under a special commission of Oyer and Terminer, and sentenced to death.¹ His sentence, however, was commuted to five years banishment.

Special commissions, however, did not satisfactorily meet the evil of long delays in the trials of accused persons, so when Spotswood became the Lieutenant Governor in 1710, Queen Anne instructed him to require courts of Oyer and Terminer to be held twice a year, for which she got much praise from the colonists. To this order of the Queen, however, the council, somewhat jealous of its prerogative, at first objected, but afterwards approved, and the time set for the first meeting of the court was in December, 1710. Here trouble arose again between the Governor and council, because the former claimed the right to appoint persons other than the councilors to hold the court. But, though objecting, they sat with the outside appointees, so long as there were no criminals to try.²

¹Justice in Colonial Virginia, 58.

²This account is taken, for the most part, from Justice in Colonial Virginia, page 59 *et seq.*

The Governor, however, referred the dispute to the Lords of Trade, who, in 1717, sustained the Governor, and thereupon he named for the court five councilors and four other prominent men, but the councilors were not satisfied with this and refused to sit in the court, eight of them agreeing that they would not act so long as any outsider was appointed to sit with them. Of course Commissary Blair, as usual, led in the fight, ready as he always was for either battle or boycott. Col. William Byrd sent in the remonstrance to the Lords Commissioners of Trade and Plantations with an able argument, to which Spotswood replied, and the matter having grown so large as to involve a constitutional question, the attorney-general of England was called in to give his opinion. He was of the opinion that the Governor had the right to appoint the outsiders, but suggested that he be restrained from convening the court except on extraordinary emergencies. And so the Lords of Trade ordered. But nobody was satisfied with this, and the General Assembly now took a hand and sent in a petition in favor of the councilors being the sole judges of the court. This the Lords of Trade refused to heed and the council gave up the fight.¹

But if the court was really needed, as seemed to be thought, the result might have been had, because the Governor was now excused from convening it twice a year, and directed only to do so on extraordinary emergencies. But Spotswood was a good politician, and had had hot water enough with the commissary. So while maintaining his right to appoint the judges of the Oyer and Terminer Court, he really only appointed members of the council to be judges and his successors did the same. This satisfied the councilors and they soon agreed that the court should be held

¹As to all of this see Spotswood's Letters. Vol. I, 8, 24. Vol. II, 54.

regularly twice a year, they holding it. So whatever the Governor got of form, the commissary and his friends, as usual, got the substance.

After that the court was held in June and December of each year, and criminals were tried then by juries of twelve men from the county where the crime had been committed, the places of those successfully challenged or who failed to appear, being filled from the bystanders. But later,¹ because summoning a jury from the county where the crime was committed proved burdensome and expensive, and for other reasons given in detail in the act, it was enacted that in capital cases, where, as was the case of most felonious and other capital offenses, the accused had formerly been convicted of crime in Great Britain or Ireland and sentenced to transportation, such a person was required to be tried by a jury of the bystanders in the General Court, or Court of Oyer and Terminer.

In answer to an enquiry from England addressed to Governor Spotswood² as to whether he was putting foreigners into the courts of judicature in the colony, contrary to the Act of Parliament, he replies in the negative as to each of the courts respectively, saying of the Court of Vice Admiralty that the judges of this court "are Gentlemen of English Birth and bred up at the Inns of Chancery, in the profession of the Law." This court which the governors continued constantly, determined matters relating to the Acts of Trade, and questions concerning the right to goods taken from "Pyrates,"³ of whom there seemed to be a good many in Spotswood's time.⁴

¹Act of October, 1748. V. Hening, 545.

²Spotswood's Letters. Vol. II, 192.

³*Id.*, Vol. II, 324.

⁴Spotswood forced Holloway to resign the office of judge of the Vice Admiralty Court under charges that he had taken fees from a pirate for professional services while he was the judge of the court that was to try the pirate. (Spotswood's Letters. Vol. II, 353.) See Sir John Randolph's sketches of Holloway. *Ante* Chapter VIII, page 180.

The first order for the erection of this court was in 1690, which, not being complied with, was renewed to Governor Andros in 1697, and the order was then complied with, the jurisdiction embracing Virginia and North Carolina. The judge at first was appointed by the Governor, but later by the High Court of Admiralty of Great Britain; the other officers, the advocate, the marshal and the register, were chosen by the Governor.¹

As constituted in 1736, the court was composed of not less than seven judges, one of whom was always either the Governor or the Lieutenant Governor, and merchants, planters and officers of ships were equally eligible to seats in this court.² The sessions of the court, however, were not regular, but were called only when there were cases to try.

Fiske says³ that from 1650 to about 1720 was the golden age of pirates, and that buccaneering was mighty and defiant along the Atlantic coast when the first English settlements south of Virginia were made.⁴ Their favorite haunts were along the coast of North Carolina, about the year 1700, and this condition called especially for the establishment of the Court of Vice Admiralty. So bad had the crime of piracy become, that the severe English methods of trying and punishing it were adopted by the colonial courts; and special courts of Oyer and Terminer, with the judge of the Court of Vice Admiralty, and such other persons as the Governor should see fit to appoint to sit with him, were frequently held.⁵

¹Justice in Colonial Virginia, 72. But the Governor was in the habit of filling vacancies and then reporting the appointments to the King, by whom they seem usually to have been confirmed in office.

²Justice in Colonial Virginia, 72.

³Old Virginia and Her Neighbors. Vol. II, 338.

⁴*Id.*, 361.

⁵Justice in Colonial Virginia, 73.

Thus the number and importance of the courts grew as the necessity and demand for them increased, but it is to be remarked that in none of them except in the case of one of the judges of the Vice Admiralty Court, was a man learned in the law allowed membership.

CHAPTER X

THE REPORTERS AND THEIR REPORTS

Of the two reporters, Sir John Randolph was the elder. He was born in 1693, and died on the 6th day of March, 1737, while Edward Barradall was born in 1704, and died on the 19th day of June, 1743.¹ Thus Randolph was forty-four years of age at the time of his death, and Barradall only thirty-nine. They died young, neither having more than reached his prime, or lived beyond the border of that period which should have been the time of his highest intellectual development and greatest usefulness, that meadowland which lies between the hills of youth and age. But this was characteristic of the public men of the colonial time. Those who read the history of that period are struck with the fact that very few of the men who figured conspicuously in that day, lived beyond middle age; most of them dying some years short of it. To this, in some measure, is to be attributed that other fact, before referred to, the frequent repetition of marriages, when there were so many comparatively young widows, and, as was natural in a new and sparsely settled country, a decided majority of males. The period of widow- or widower-hood too, was correspondingly brief, and the maidens married at a far earlier age than is customary now.

Sir John Randolph was the sixth of nine children of William Randolph of Turkey Island, an estate on the James River about twenty miles below Richmond, where John Randolph² was born in 1693. Of the

¹The time is reckoned according to the present style.

²John Randolph of Roanoke, of the same stock, but of a later day, must not be confounded with this John Randolph.

nine children seven were sons and two daughters,—William, Thomas, Isham, Richard, Elizabeth, Mary, Edward, John, and Henry. The father, William, was the immigrant or colonist, coming to Virginia in 1674 from Morton Morrell, in Warwickshire, England, where he was born in 1650. He married Mary Isham,¹ the daughter of Henry Isham of Bermuda Hundred, and died at Turkey Island, April 15, 1711.

William Randolph came of an old family in England² but his happiest claim to good breeding is more of a prospective character, in that he enjoys the singular felicity of having been the common ancestor of Thomas Jefferson,³ John Marshall,⁴ and Robert E. Lee.⁵

It can hardly be doubted that had William Randolph of Turkey Island known that in the generations to come his stock would give to his country three such sons, he would have thought he had in that prospect a far juster cause for pride than he felt because of his long line of English ancestry.

But William Randolph's claim to merit does not rest merely upon heredity, retrospective or prospective. He was himself a man of high character and good sense, and deservedly exercised much influence in public matters in the colony, holding several important offices. He had large wealth, much of which was invested in real estate, and his house at Turkey Island was a handsome mansion, built, it is said, of brick

¹See Virginia Magazine. Vol. IV, 123. "Of the Antient & Eminent family of Northamptonshire." Virginia Magazine. Vol. III, 262.

²Cyclopedia of American Biography, 174. Virginia Magazine. Vol. III, 262.

³Jane, daughter of Isham, son of William of Turkey Island, married Peter Jefferson, father of Thomas Jefferson.

⁴Thomas Marshall of Oak Hill, father of John, married Mary Isham Randolph, daughter of Rev. James Keith and Mary Isham Randolph, who was the daughter of Thomas Randolph of Tuckahoe, son of William of Turkey Island.

⁵Elizabeth, daughter of William Randolph of Turkey Island (and sister of Sir John), married Richard Bland. Their daughter Mary married Henry Lee. Henry, son of this marriage, married Lucy Grymes, of whom see *ante* page 211. Henry (Lighthouse Harry), son of Henry Lee and Lucy Grymes Lee, married Anne Hill Carter, and Robert E. Lee was a son of this marriage.

which he brought from England on his own ship.¹ His sixth son, John, after receiving an academic education at William and Mary College, studied law at Gray's Inn and at the Temple in London. After completing his legal studies he returned to Virginia and practised law at Williamsburg, although he had estates in Gloucester, where he was at one time county lieutenant. His home at Williamsburg, which he called Tazewell Hall, was at the south end of England street, and only a small part of it still stands;² but his pew in Bruton Church, of which he was a vestryman in 1727, is still marked as No. 25,³ the second from the front at the right-hand side of the main aisle as you enter.

Randolph married Susanna Beverly,⁴ whose handsome portrait hangs by his in the chapel of William and Mary College. Their children were John, who was attorney-general of Virginia (the last by royal appointment), Peyton, the first president of Congress, Beverly, and Mary, who married Philip Grymes of Brandon, Middlesex.⁵

He was attorney-general for the colony, member of the House of Burgesses as a representative for William and Mary College, speaker of the House of Burgesses, treasurer of the colony and the first recorder of the new borough of Norfolk.

In 1730, while visiting England on behalf of William and Mary College, he was knighted, a tribute, it was said, to his diplomatic talent shown on that visit, as well as to his high standing at the bar in Virginia. He had prepared some notes with a view to giving an historical account of the constitution and govern-

¹See a full account of the official positions held by him, and of his English ancestry, in *Virginia Magazine*. Vol. III, 261 *et seq.*

²Williamsburg, 253.

³Bruton Parish Church Restored, 134.

⁴Daughter of Hon. Peter Beverly.

⁵*Virginia Magazine*. Vol. III, 268.

ment of Virginia, but his many public and private engagements prevented his carrying out his purpose. Such notes as he had prepared were used by his nephew William Stith, in the preparation of his history of Virginia.¹

That he was an able lawyer comes down as the testimony of all of his contemporaries, and is fully sustained by a review of his arguments in the many important cases he was engaged in, as they are set forth in his own reports and those of his professional rival, Edward Barradall, printed in this book.

He died March 9, 1737, at the early age of forty-four, and on March 11th there appeared in the *Virginia Gazette*² an obituary notice of him which, besides its attractive quaintness, gives so full a sketch of him that I insert it here:

"On Monday last, the Hon. Sir John Randolph, Knt., Speaker of the House of Burgesses, Treasurer of this colony, and Representative of William and Mary College, was interred in the chapel of the said college. He was (according to his own directions) carried from his House to the Place of Interment, by six honest, industrious, poor House-keepers of Bruton Parrish, who are to have Twenty Pounds divided among them: and the Rev. Mr. Dawson, one of the Professors of that College, pronounced a Funeral Oration in Latin. His Corps was attended by a very numerous assembly of Gentlemen and others, who paid the last Honours to him, with great Solemnity, Decency and respect. He was in the 44th year of his Age.

"He was a Gentleman of one of the best Families in this Country. Altho what Livy says of the Romans,

¹Virginia Magazine. Vol. III, 265.

²The Virginia Gazette, March 11, 1736-37. Virginia Magazine, Vol. I, 265.

soon after the Foundation of their City, be very applicable to us here (*in novo populo, ubi omnis repertina nobilitas fit*) yet his family was of no mean Figure in England before it was transplanted hither. Sir Thomas Randolph was of a Collateral Branch, which had the Honour, in several important Embassies, to serve Q Elizabeth, one of the wisest Princes that ever sat on an English Throne, very nice and difficult, and happy, even to a Proverb, in the choice of her ministers.

"Among these Sir Thomas made no inconsiderable Figure, and is acknowledged to have been a Man of great Parts and Ability and every Way equal to the Emploiments which he bore. Mr. Thomas Randolph, the poet, was great Uncle to Sir John. An immature Death put a stop to his rising Genius and Fame; but he had gained such a reputation among the wits of his age, that he was exceedingly lamented; and Ben Johnson always expressed his Love and Esteem for him, calling him by no other Title, but that of Son. The family were high Loyalists in the Civil wars, and being entirely broken and dispersed, Sir John's father resolved (as many other Cavileers did) to take his Fortune in this part of the World.

"By his mother's side he was related to the Ishams of Northamptonshire an ancient and eminent Family of that county.

"Sir John discovered, from his earliest Childhood, a great Propensity to Letters. To improve which, he was first put under the Care of a Protestant Clergyman, who came over among the French Refugees. But afterwards he received a fuller and more complete Education in William and Mary College, for which Place (with a Gratitude usual to Persons who make a proper use of the Advantages to be reached in such Seminaries) he always expressed the greatest Love and Respect,

not only in words, but by doing real and substantial Services. He finished his Studies, in the Law, in Gray's Inn, and the Temple, and having put on his Barrister's Gown, returned to his Native Country; where from his very first appearance at the Bar, he was ranked among the Practitioners of the First Figure and Distinction.

"His Parts were bright and strong, his learning extensive and useful. If he was liable to any censure in this Respect, it was for too great a Luxuriancy and Abundance; and what Quintilian says of Ovid, may with great Propriety, be applied to him: *Quantam vir ille præstare potuarit, si ingenio suo temperare quam indulgere moluisset.*

"In the several Relations of a Husband, a Father, a Friend, he was a most extraordinary Example; being a Kind and affectionate Husband without Fondness or Ostentation; a tender and indulgent Parent, without Weakness or Folly; a sincere and hearty Friend, without Profession or Flattery. Sincerity indeed, ran through the whole Course of his Life with an even, an uninterrupted current; and added no small Beauty and Lustre to his Character, both in Private and Publick.

"As he received a noble Income, for Services in his Profession and Employments, so he, in some Measure, made a Return, by a most generous, open and elegant Table. But the Plenty, Conduct, and Hospitality which appeared there, reflect an equal Praise on himself and his Lady.

"Altho he was an excellent Father of a Family, and careful enough in his own private concerns, yet he was ever more attentive to what regarded the Interests of the Publick. His Sufficiency and Integrity, his strict Justice and Impartiality in the Discharge of

his Offices, are above Commendation, and beyond all reasonable Contradiction. Many of us may deplore a private Friend; but what I think all ought to lament is the loss of a Publick Friend; an Assertor of the Just Rights and natural Liberties of Mankind; an enemy to Oppression; a Supporter to the Distressed; and a protector of the Poor and indigent, whose cause he willingly undertook, and whose Fees he constantly remitted, when he thought the Paiment of them would be grievous to themselves or Families. In short, he always pursued the Public Good, as far as his judgment would carry him; which, as it was not infallible, so it may, without Disparagement to any, be placed among the best that have ever been concerned in the Administration of the Affairs of this Colony.

“The following Particular may perhaps be thought trifling. However, I cannot help observing that all these accomplishments received an additional Grace and Ornament from his Person, which was of the finest Turn imaginable. He had to an eminent Degree that *ingenuo totius corporis pulchritudo & quidam senatorius decor* which Pliny mentions, and which is somewhere not unhappily translated ‘The Air of a Man of Quality.’ For there was something very Great and Noble in his Presence and Deportment, which at first Sight bespoke, and highly became, that Dignity and Eminence, which his Merit had obtained him in this Country.”

But as if to prove that neither measure of eulogy, nor the resources of the Latin tongue had yet been exhausted in singing the praises of Sir John, the theme was carried some stages further by the erection to him in the chapel of William and Mary College of a tablet, which remained unimpaired by time or accident until the fire of 1859, which destroyed all of the college

except the brick walls, and destroyed also the tablet. Of this tablet the Virginia Gazette, on April 20, 1739, about two years after Sir John Randolph's death, says: "A beautiful Monument of curious Workmanship, in Marble, was lately erected in the Chapel of the College of William and Mary, to the memory of Sir John Randolph¹, who was interred there, and which has the following inscription upon it." Then follows the inscription.

In 1903 a new tablet was erected (in place of the one destroyed in 1859) with much ceremony and with a notable gathering of distinguished people, and including many of the descendants of Sir John Randolph.² The original inscription was renewed upon the tablet of 1859 and is as follows: —

Hoc juxta Marmor S.E.
JOHANNES RANDOLPH, Eques.
 Hujus Collegii dulce ornamentum alumnus;
 Insigne praesidium gubernator,
 Grande column senator,
 Guilielmum patrem generosum,
 Mariam ex Ishamorum stirpe
 In agro Northamptoniensi matrem,
 Praeclaris dotibus honestavit,
 Filius natu sextus,
 Literis humanioribus
 Artibusque ingenuis fideliter instructus;
 (Illi quippe fuerat tum eruditionis,
 Tum doctrinae sitis nunquam explenda)
 Hospitium Graiense concessit,
 Quo in domicilio
 Studiis unice deditus,
 Statim inter legum peritos excelluit,
 Togamque induit;
 Causis validissimus agendis,
 In Patriam
 Quam semper habuit clarissimam reversus,
 Causidici,
 Senatus primum clerici, deinde prolocutoris,
 Thesaurarii,
 Legati ad Anglos semel atque iterum missi,
 Glocestriae demum curiae judicis primarii,
 Vices arduas honestasque sustinuit
 Perite, graviter, integre;
 Quibus in muniis,
 Vix parem habuit,
 Superiorem certe neminem.

¹Virginia Magazine. Vol. III, 267.

²William and Mary Quarterly. Vol. XII, 67.

Hos omnes quos optime mervit honores,
 Cum ingenua totius corporis pulchritudo,
 Et quidam senatorius decor,
 Tum eximium ingenii acumen
 Egregie illustrarunt.
 At æquitas summi juris expers,
 Clientum fidele omnium
 Pauperiorum sine mercede patrociniū
 Hospitiū sine luxu splendidum,
 Veritas sine fuco,
 Sine fastu charitas,
 Ceteris animi virtutibus
 Facile praeluxerunt.
 Tandem
 Laboribus vigiliisque fractus,
 Morboque lentissimo confectus,
 Cum sibi satis, sed amicis, sed Reip: parum vixisset,
 Susannam,
 Petri Beverley Armigeri
 Filiam natu minimam,
 Conjugem delectissimam,
 (Ex qua tres filios filiam que unicam suscepit)
 Sui magno languentem desiderio
 Reliquit
 Sexto Non: Mar: Anno Dom: 1736-7
 Ætat: 44.

The original Tablet
 was destroyed by the fire
 which consumed the college building
 on February 8, 1859.
 Restored in 1903 by Sir John Randolph's
 great, great, great grand-daughter
 and her children, and children's children.

From page 68, Vol. XII, of the William and Mary Quarterly, I take what is there declared to be "a free translation of the inscription:"

"Near this marble lie the remains of Sir John Randolph."

"As an alumnus of the college he was one of its brightest ornaments. As a member of the Board of Visitors he was a noble champion of its rights. And as a member of the Council of State he was a perfect tower of strength.

"He was the sixth son of William Randolph, Gentleman, and of Mary Isham, of Northamptonshire, in England, upon whom his brilliant talents shed much honor.

"He early exhibited an insatiable eagerness for learning and acquired a thorough knowledge of the arts and sciences.

"He then attended Gray's Inn, in London, where he was an earnest student of legal lore, and from the very start excelled in his studies.

"After graduating as barrister at law, he returned to his dear native country of Virginia, where he almost at once attained the first position at the bar.

"He filled successively the offices of Clerk of the Council of Virginia, Speaker of the House of Burgesses, Treasurer of the Colony, agent for the Colony at the Court of the Mother Country, and presiding magistrate of the Court of Gloucester County, Virginia.

"In these offices he was distinguished as a hard and conscientious worker, and had few equals and no superior in the way he discharged his duties.

"He not only deserved his honors, but lent dignity to them, as well by his handsome person as by the stateliness of his bearing and brilliant powers of mind.

"He was especially distinguished for many high qualities, for his learning in the law, which was extraordinary, for his unbounded generosity to his indigent clients, his simple, but elegant hospitality, his truthfulness without a suspicion of deceit, and his kindliness unaffected by the slightest assumption.

"At length incessant labor, to the great sorrow of his friends, proved too much for his health, and after a lingering sickness he died on the 6th of March 1737, aged forty-four years.

"By his wife, Susanna, the youngest daughter of Hon. Peter Beverly, of Gloucester County, he had three sons and one daughter."

The prominence of Sir John Randolph's family, its large connections and extensive influence in the colony, as well as the distinction attained by Sir John in his own short life, have caused to be preserved these particulars of him, so that the task of thus presenting

this sketch has been but the easy one of a copyist. Not so easy nor near so interesting is the duty of presenting to the reader some idea of the reports which he wrote out, and the publication of which at this time is the occasion of this personal introduction of Sir John Randolph.

The cases, the record of which is preserved, with evidence or *indicia* sufficient for a reasonable assurance of their authenticity, are forty in number, and with the exception of a few isolated words and about two full pages more, which in the manuscript had become illegible, and with also a few scattered words, about the interpretation of which there is a doubt, are correctly copied and printed in this work. A glance at them shows that they conform to the old style of English reports, and are very different from those with the convenient use of which the members of the bar of this generation are familiar. Dyer's, Hobart's and others of the old reports were the precedents for these manuscript reporters, and, like them, these contain no synopses, but only the titles of the cases at their heads. As the General Court delivered no written opinions, and generally gave no reasons at all for their conclusions, there was nothing of a case to be reported except the statement of it, and the arguments of counsel. The reports of the cases are therefore chiefly the briefs of counsel, but even here there was a limit. In the cases reported by Randolph he gives his own arguments in full, and only occasionally a statement of the points made by his adversary. So in Barradall's manuscript he gives his own arguments very fully, but is a little more liberal to his adversary than Sir John was.

Although Randolph was eleven years older than Barradall, and died six years before him, they were

pitted against each other in most of the cases which they reported respectively. But as, except in a very few instances, they did not report the same cases, we get from the manuscripts in each case, as a rule, only the argument of the reporter. Both were evidently men of ability and learning. Randolph's style, however, is much to be preferred. There is in his arguments not the same manifestation, or perhaps ostentation, of learning, but a simpler, stronger and clearer presentation from reason and fairness, and by illustration. At the same time, if there was any chance to trip his adversary by resort to technical objection, it was availed of with equal avidity by both.

It is hard to read these arguments of often intricate and abstruse points of law and rules of practice, addressed to a body of country gentlemen, educated in everything except in the art of special pleading, and understand how they could patiently listen to them or in any wise profit by them. And yet they did listen, and sometimes decided cases upon purely technical questions. And the records show that they had *opinions* on these subjects, for the court was frequently divided on them.

In the reports of Randolph many of the cases are either actions of ejectment or bills in chancery calling for the construction of wills or deeds relating to land, and there are some actions of trespass reported, involving also questions of ownership of real estate. In many instances the case turns upon the character of the estate, whether the instrument (deed or will) created an entail or a fee simple title.

There are a few actions for slander in which the court had to determine, what was much more difficult

then than now, whether the words spoken or written were actionable at common law.

A number of cases relate to the ownership of or right to the service of slaves, generally arising in actions of detinue. In many of these cases seemingly inextricable difficulties arose over the repeated (often at amazingly short intervals) marriages of widows, often to widowers.

As the property of the deceased husband frequently came by devise to his widow, sometimes absolutely and sometimes for life, and her ownership, derived from a previous husband, passed by her subsequent marriages to a subsequent husband, repeated several times, with their several intermittent rights of property, and often accompanied by some disposition of it, or its seizure under execution or other liability for their debts, and as sometimes happened, the original devise of the negroes was for life only, and there came increase of them, sometimes between the dates of the original will and the death of the testator, and sometimes during one or more of the repeated marriages, it can readily be understood what complications arose and why the practice of the law in those colonial times was quite a profitable business, at least during the eighteenth century, when there were large estates to be affected.

Sometimes these marriages, especially when there were sets of children already existing on each side, and more came with each repetition, brought about conditions as intricate as a picture puzzle. A few examples will suffice.

In *Gadden vs. Morris*, Randolph manuscript 188, the plaintiff's father died intestate, leaving a small estate consisting in part of three negroes, a man and his wife and child, in all appraised at fifty pounds, and

was indebted at the time of his death. The widow qualified as executrix, and according to the custom of the day, very soon married,—this time to a man named Stannup. A creditor of Gadden thereupon sued and obtained judgment against the bride and groom for the late husband's debt, and levied execution upon the negro woman and child. Stannup paid the judgment and took the two negroes, thinking that he thereby acquired a right to them. Later he made up an account for his debt, interest and trouble, for an amount more than nine pounds in excess of the appraised value of the three negroes. The woman had more children, in all amounting to seven, and then Stannup died, disposing of the negroes by his will, and making his widow his executrix. Thereupon, in due course, the widow, now such for the second time, married a man named Morris. Some of the negroes were retained by Morris and his wife, and some of them were given to Stannup's daughter, who had married a man named Allen.

The bill in chancery states all this, and also avers a fraudulent combination between the original creditor of Gaddin and Stannup, the second husband, to vest the property in the slaves in Stannup, and both Morris and Allen are sought to be held liable for the value of the slaves. Randolph was for the plaintiff, and his argument is worth the reading, to show the character of the questions that this court of country gentlemen had to hear argued and to decide.

The case of *Meekins vs. Burwell*, Randolph manuscript 126, was an action of ejectment upon a lease, and the plea was, "not guilty," with a special verdict, which was very often resorted to in these colonial cases. The verdict was that Meekins, seized in fee of certain lands, died leaving four children,—three sons

and a daughter. To each son he gave a parcel of land and a legacy besides, and to the daughter a legacy. But there is this clause in the will "If it shall happen that any of my said children die without issue, then that share shall equally be divided among those that survive. But if all my children die without issue, then my lands shall fall to my heirs in England." At their father's death the three sons entered into their possessions. One of them, William by name, died in a few years, without issue. Thomas, apparently after William's death, conveyed his part of the estate to Humphrey Browning, but William Brown, in the right of the other son, Roger, entered upon the land conveyed to Browning. Thereupon Browning sued Brown in ejectment, and recovered,—the General Court holding that Thomas had a fee in William's part. Then Browning "enfeoffs Lewis Burwell." Roger, the third son, by several deeds of lease and release, also conveyed his part of the real estate to Lewis Burwell. Lewis Burwell died and devised these lands to his son James, from whom they descended to Baron Burwell. Then Thomas Meekins, the oldest of the three sons, conveyed a part of his land to Robert Martin in fee. Martin conveyed to Alexander Walker, from whom the lands descended to another Walker, and to the wife of one Holdeross, who was a Walker. Thomas Meekins died leaving issue. Roger Meekins died without issue, and the daughter, Mary, who had married one Vadin, died leaving one son.

Now upon the special verdict in this action of ejectment the rights of the parties litigant relate back to the will of the older Meekins, and Randolph thus states the question:

"In the first part of the will of Thomas Meekins the three sons took an estate in fee simple in the

several Parcels of Land Devised to them which shall not be restrained by an Estate Tail, unless the Testators meaning in the subsequent words appear to be so. If they be dark and doubtful the Fee Simple Estate stands uncontrovertible. Polf, 426. So the question will be whether the latter clause be so clear as to show the Testators Intent That instead of a fee simple they shou'd have an Estate Tail in the several parts or what his Interest was."

Then follow four pages of argument, with a decision against Randolph, who seems to have at last prevailed upon a technical exception to the declaration.

The case of *Martin vs. Parrish*, Randolph No. 145, was an action of detinue, the question being as to who was entitled to the increase of a certain negro woman, the subject being greatly complicated by three marriages of the widow in rapid succession.

In the case of *Swiney vs. Dandridge*, Randolph manuscript 216, it appears that one Roccow left quite an estate to his widow, and one hundred pounds to his young godson. But the widow married the boy, who died before he was twenty-one years of age, and therefore, claiming the legacy in her right as his widow, she sued the first husband's estate for it, but the record says she was denied her claim "by a great majority of the Court."

These also are among the purely technical questions upon which the court had to decide cases submitted to them. Whether in an action of trespass ownership had to be distinctly averred or might be implied, as when the plaintiff averring ownership of the land, that averment necessarily implied ownership of a house on the land. Whether a declaration in assumpsit was

faulty for not averring that the defendant "assumed." If upon the plea of a former judgment the record was a good defense where it said, "The judgment of the Court in this case is that the Plffs suit is dismissed," instead of saying, "The Plff takes nothing by his bill;" the comment of the reporter being, "So we see how the people of the Country suffer by the Ignorance of the Clarke." In another case, if an averment "being under 16 years of age" was as good as "was under 16 years of age." And in one of the cases reported by Barradall there is a very thorough and complete discussion of the question of where the action of trover and where detinue would lie; it being insisted in the case, that a declaration, filed in the action of detinue for a chest of medicines, was not good because it did not specify each particular medicine, and that the verdict which used the words "did detain," should have said "doth detain," and was therefore faulty.

Besides these mere technical questions the court was called on to determine some points, which at the time must have been very novel, such as the effect of the statute of limitations, in force when pleaded but repealed before trial; the right to the increase of slaves held under a conditional estate that failed; and whether special words in an act of the General Assembly should restrain subsequent general words.

The tone of all the arguments is moderate and courteous, but once Randolph does say of his adversary Hopkins' argument, that it "was very Trifling and incoherent," and there is a note to a case, written out with a degree of frankness only equalled by the diary of Samuel Pepys, in which Randolph's client got the worst of it, wherein at the end of the report he says: "But the Lawyers on both sides the next morning

met in the Secretary's office to direct the Clerk in drawing the Decree according to the Opinion above ment'd. But the Lawyers for the Deft telling the Clerk the moiety of the 1100 acres was to be divided by Parmels will between his children, and that the Plts were entitled to the other moiety under Arthur Proner, and that the Deft R. B. to one half of the 1100 acres and the Plts the other half. So the decree *was drawn, and being for my clients advantage I did not gainsay it.*"

As before observed, the prominence of the family of Sir John Randolph during his life and ever since, the many official positions held by them, their wealth, and their large and distinguished family connections, made it natural that their family history, and especially what related to so important a member of it as Sir John, should have been preserved. It was not hard, therefore, to find material from which to produce this sketch of him.

But it was very different with Edward Barradall. He was, it is true, "*armiger*,"¹ and therefore of the same social set with the Randolphs, and that counted for much in those days. But his family connection was small, and as he died without children and neither of his two brothers nor his two sisters appear to have married, the family name perished with him. It was, indeed, quite difficult to ascertain his parentage. The mention by Bishop Meade of Edward Barradale (*sic*) and Edward Barradale, Jr.,² among the vestrymen of Bruton Parish between 1674 and 1769, and the further mention in "Bruton Church" of a Mrs. Barradall as having held five slaves, baptized in 1754, seemed to

¹Entitled to armorial bearings, or, better translated, "Gentleman."

²Old Churches, Ministers, etc. Vol. 1, 178. In "Bruton Church," page 119, two "Edward Barradall, Jr.'s," are mentioned.

make it probable that there were two Edward Barradalls, and that among these above mentioned were the father and mother of the reporter. It is still considered most probable that this Mrs. Barradall, still living in 1754, was his mother. As his wife died a few months after his death, and they had no children, and neither of his brothers appear to have married, this Mrs. Barradall might well have been his mother, although in 1754 she would have been about eighty years of age. But it is very evident that his father was not named Edward, and the mention of two of the name as vestrymen by Bishop Meade is most probably a mistake. The reason for this conclusion is found in the discovery, by Mr. W. G. Stanard,¹ in the calendar of "Faculty Office Marriage Licenses," issued by the English Record Society, of an entry of the marriage license of Henry Barradall and Catherine Blumfield, dated June 6, 1696. As Edward Barradall was born in 1704, and had two brothers whose names were Henry and Blumfield, the inference is very strong that the Henry and Catherine who were married June 6, 1696, were his father and mother.²

In a corner of the churchyard of Bruton Church at Williamsburg, in a conspicuous place, is a very large and handsome tombstone, which Bishop Meade³ says was erected by Elizabeth and Frances, two sisters of Edward Barradall and of Henry and Blumfield Barradall, who are buried near by, and whose names, he says, are also cut upon the stone. I give the inscription on the tomb, with such translation as can be most intelligently made of it:

¹The accomplished secretary of the Virginia Historical Society.

²Whether they ever came to America, is not *known*, but the presence in this country of the three sons and the two daughters make it most probable.

³Old Churches, Ministers, etc. Vol. I, 199.

(Arms)¹
H. S. E.²
EDWARDUS BARRADALL Armiger.
Qui
In legum studiis feliciter versatus
Attorni Generalis et Admiralitatis Judicis
Amplicissimus Partes merito obtinuit
Fideliter obivit
Collegium Gulielmi et Mariae
Cum Gubernator
Tum in Conventu Generali Senator
Propugnavit
Saram
Viri Honorabilis
GUIL FITZHUGH Armigeri
Serenissimae Reginae Annae in Virginia a Conciliis
Filiam Natu minimam
Tam Mortis quam Vitae Sociam
Uxorem habuit
Obierunt
Ille XIII Cal JUNII A D MDCCXLIII AE } XXXIX
Illa Non Oct. } XXX
Hic iuxta situs est
HENRICUS BARRADALL
E B supra dicti Frater
Qui
Obiit XVIII Cal Octob AD MDCCXXXVII
Ætat XXVII
BLUMFIELD BARRADALL tantum Frater³

A free, but I believe an accurate, translation of this epitaph is as follows:—

Here lies Edward Barradall, Gentleman (or, strictly translated, entitled to armorial bearings) and who being well versed in the study of the law, and of excellent attainments, deservedly won the places of Attorney General and of Judge of the Vice Admiralty Court, where he served faithfully.

At one time, on behalf of the President of William

¹ From a rough drawing in the possession of the editor, the arms of Barradall (tincture not given) a bend, three pheons, an annulet for difference, are impaled with Fitzhugh. Az: three chevrons braced in bars of escutcheon, or a chief of the last. William Fitzhugh, lawyer, planter, merchant and shipper, the ancestor of the well-known family of the name, was born in Bedford, England, January 9, 1651, settled in that portion of Stafford, now comprising Prince George County: died at his seat, Bedford, Virginia, in October, 1701."

² *Hic Situs Est.* For this epitaph see Virginia Historical Collections. Vol. XI, 75. Bruton Church, 102.

³ After this there is a space that seems once to have contained several more lines, which have been wholly obliterated by the wearing away of the stone from the action of the elements. They probably contained the date of Blumfield Barradall's death, and perhaps the names of the sister who erected the tomb, as mentioned by Bishop Meade. Old Churches, etc. Vol. II, 199.

and Mary College, he was a member of the General Assembly.

He had for his wife, his partner in life and in death, Sarah, youngest daughter of the Hon. Wm. Fitzhugh, Gentleman, a member of the Council from Virginia of her Majesty Queen Anne. They died, he on the 19th day of June, 1743, aged 39, and she on the 7th day of October, 1743, aged 30.

Near by lie the bodies of Henry Barradall, the brother of the above named Edward Barradall, who died on the 14th day of September, 1739, aged twenty-seven years, and of Blumfield Barradall, also his brother. . . .

Of the family name, Bishop Meade says it was an ancient and most respectable one. "It is another name for one learned in the law — a name which for a long time was a terror to the young applicant for a license to practise law, and before which even a Pendleton trembled at his examination."¹

Hayden's "Virginia Genealogies"² contains the following:

"The list of families in the colony who, in vested right, used coat armor, as attested in examples of such use on tombstones, preserved bookplates, and impressions of seals, is more than one hundred and fifty. The virtue of such investment by royal favor may appear somewhat in the fact that the Virginia rebels, Claiborne, Bacon, Washington and Lee, were all armigers, and among others were the Amblers, . . . Barradalls, . . . and so on throughout the alphabet in swelling numbers and comprehensive example of ability and worth."

Where Edward Barradall was born is not known,

¹Old Churches, Ministers, etc. Vol. I, page 198.

²Wilkes Barre, Penn., 1871, page XIII.

and indeed, although it is highly probable that his parents came to Virginia to live, nothing could be found *to prove it*.

The inscription on the tombstone shows that his brother Henry was born in 1710, and therefore Edward Barradall was six years his senior, but the ages of the other brother and of the two sisters is not known. That the sisters survived their three brothers is proved by the fact that they erected the tombstone, but beyond this nothing at all is known of them.

Edward Barradall was a vestryman of Bruton Church and occupied pew No. 10, the fourth from the entrance on the left-hand side of the main aisle of the church. His legal education, at least, was had in England, at the Inner Temple. As a lawyer his standing was high, and at an early age he acquired a large practice.

The Virginia Gazette of November 18, 1737,¹ announces the death that morning between five and six o'clock, of John Clayton, Esq., "His Majesty's Attorney General and Judge of the Court of Vice Admiralty," and closes with the announcement that "His Honour the Governor has been pleased to appoint Edward Barradall, Esq., to act as Attorney General until His Majesty's Pleasure shall be known." This office he held until his death, and he also succeeded Mr. Clayton to the offices of judge of the Vice Admiralty Court, and as representative in the General Assembly for William and Mary College. He was a member of the General Assembly at the sessions of November 1, 1738, May, 1740, August, 1740, and May, 1742.²

On January 5, 1735-36, Barradall married Sarah, daughter of Hon. William Fitzhugh, of "Eagles Nest," Stafford, now King George County, Virginia. She

¹Virginia Magazine. Vol. XIV. 5.

²No copies of the Virginia Gazette corresponding to these dates could be discovered.

was the granddaughter of Col. William Fitzhugh, one of the best known lawyers of the colony. She did not long survive her husband, he dying in June and she in October, 1743.

Edward Barradall is spoken of as the earliest Virginia reporter, but in fact both Hopkins and Randolph wrote their manuscript reports in advance of Barradall. His, however, are much the more numerous, Randolph's consisting of forty cases, while Barradall wrote out ninety-seven cases.

Barradall's style in the argument of his cases is more labored and less interesting than that of Randolph. There is greater display of learning, and more evidence of preparation and research, but it can readily be seen that Randolph was the superior advocate. He must have been much the readier debater, and his handsome and attractive personality gave him decided advantages, both before the regular juries and before the County and General Courts, both of which courts, indeed, were but more select and superior juries.

The cases reported by Barradall are of much the same character as those reported by Randolph, and any further review of them would be but a repetition of what has been already said.

These later reported cases show how often Randolph and Barradall were opposed to each other, in the later years of Randolph's life, but they are rather more liberal in noting the views of Randolph than the latter seems to have been of the positions taken in the arguments by his opponents.

There is nothing to indicate that the cases these reporters have preserved in their manuscripts were intended by them for publication, and if they, or either of them, had any such decided purpose, it probably was not the primary motive that influenced them.

Of cases dependent upon English law they had, compared with this day, few precedents, but still enough. For rulings upon the colonial statutes there were no precedents. Then, too, there were cases involving both English and Colonial law, and the practice of the law was English, modified not a little by local custom. In the eighteenth century law business had acquired considerable proportions, and more and more cases of a mixed complexion were likely to arise. It became, therefore, a matter of concern to the busy lawyer to have at hand the decisions of the General Court, the highest in the colony, and the chief tribunal of both original and appellate jurisdiction. Then, too, there was an attraction in preserving in book form (even a manuscript book) those arguments on which so much labor had been bestowed, and which would constitute the chief part of the reported case.

Although there seemed to be no immediate prospect of printing, the writers scarcely anticipated that this publication would be delayed near two hundred years; or hardly thought that before their writings had come to a condition for public usefulness, they would have been anticipated and become fossilized by trooping generations of book-makers, reports of decisions too numerous to be counted, and digests which offer the gist of lengthy cases in an abridgment of a few lines. Nor did they ever imagine that within two centuries from the time of their writing in the little city of Williamsburg, there would be in this land such a swelling tide of population, such unimaginable changes in the volume and condition of property holding, and such a consequent rush, demand and need for shorter and quicker methods of meeting the instant and constant necessities of business, or that they, and what they wrote, would have their chief interest in having

been the beginning of things of their kind,—the little fountains to be sought chiefly by those who will always seek the sources, no matter how wide may be the stream.

So it has come about that the writers and their writings have to be brought together, the public and private conditions with the principles of law and government which those conditions produced, and which in time governed them, before either could be fully appreciated. And that is both the motive and the excuse for coupling these ancient cases, the first recorded deliverances of the earliest courts, with the story of the people and the country, whose rights and wrongs were preserved and remedied by these decisions of the court, now brought to light and offered to the reader

SIR JOHN RANDOLPH'S REPORTS

SIR JOHN RANDOLPH'S REPORTS

October 1729.

[114]¹ [Here ends (*sic*) the Arguments of Edward Barradall Esq, and next comes the Reports of Sir John Randolph of Cases Adjudged in the General Court.]

²SMITH *vs* BROWN. *Trespass. Fr Plt.*

In trespass the plt. must charge the goods injured were his proper goods. Except those part of the close broken—he need not fix any value to the goods damaged. The same action may be felony ag't Common'lth and trespass as to individual.

The Plt. Declares that the Deft. such a Day and Year broke and entered the Close of the Plt. at South Farnham in the County of York and took and carried away 4000 lb. Tob'o of the Plts. to the value of 40£ Curr't money and did burn and destroy one Tob'o House then and there being

Upon not guilty a Verd't is found for the Plt. and 25£ Sterl'g Damage and now upon a Motion to Arrest the Judgment it is objected that the Decl. is nought as to the burning of the House it [not] being laid to be the Plts. House, and entire Damages are given. So if the Plt. as to one Trespass hath not Shewn a good cause of Action the Verd't is not good and he shall not have Judgm't, which is agreed

It must be agreed likewise that if there are no words in the Declaration which do sufficiently alledge the House to be the Plts. it shall not be intended after a Verdict

But it will be necessary to understand the reason of the Law in this point which is clear enough in the cases that must be Cited in Maintenance of the Exception. So I shall mention all or most of the Judgments which have been given upon this point in Order to settle the true difference between them in the present Case

In the Case of Whiteman and Hawkins, 3. Bulst. 303. the Plt. Declares of breaking his Close and taking and carrying away

¹These figures, in brackets, refer to the original paging of the manuscript.

²S. C. in MSS. Virg. Rep. in Congr. Libry. Supposed to have come from Mr. Jefferson's Library. [Note by W. G.]

three Sheaves of Corn then and there being After Verd't the Judg't was stay'd. Because it was not Alledged to be the Corn of the Plt. notwithstanding the Words then and there being, which the Court held wou'd not supply it

In the Case of Furrel and Bradley Yelv. 36. The Plt. Declared of an Assault and taking a *Mare a Persona ipsius (sic)*. And after a Verd't it was moved in Arrest of Judgment, that the Decl. was not good Because the Plt. had not laid any property in the Mare, for there may be two Intendments as the Declaration is, one that the Mare was the Defts. Then the taking was Lawful. The other that it was the Plts. and then it was Tortious. So being indifferent it shall be taken strongly ag't the Plt.

[115] 2d Suit Concess *vs* Fenner being only then in Court, Same Case is Reported in Cro. Ja. 46. and there it appears that Judgment was given Accordingly by the Judges, Gawdy, Fenner & Yelverton

In the Case of Terry and Stradwick 2. Lev. 156. In Case for Obstructing a Water Course and turning the water upon the Plts. land whereby it was overflowed and Twenty Load of Hay then and there being was Spoiled, not saying the Plts. and for that reason Judgment was Arrested tho it was objected that it might be intended the Hay of the Plt.

In the Case of Bennet and Collingdel 2. Show. 395. In Trespass for taking and carrying away the Cattle of the Plt. to wit, one Horse and a Hat. After a Verd't Judm't was arrested because no property in the Hat is laid in the Plt.

And the same point is Admitted in several other Cases 2. Lev. 20. 2. Sannd. 379. Raymond 395. 2. Rol. 250. Pl. 7. Yet *vid* Usher and Bushley 1. Keb. 53.

In the case of Joce and Mills 2. Salk. 64 c. The Plt. Declared for breaking his Close and taking and carrying away the Horses then and there found and 100 Bushels (*Congeoo*) of Wheat of the proper Goods of the Plt. then and there also found. Upon Not guilty a Verd't was found for the Plt. and Judgment was Arrested Because the Horses were not laid to be the Goods of the Plt. for it did not follow that they were the Plts. because they were found in the Plts. Close and the Court wou'd not allow *de bonis propriis* to be Applied to the Horses, being different Sentences, tho as to that there is a contrary Resolution 2. Rol. Abr. 250. Pl. 7. Allowed in that Case by one Justice to be Law.

These Cases it must be allowed do prove very Clearly That where the Plt. in Trespass Declares of breaking his Close and taking and carrying away Goods or anything Severred from the Freehold he must lay the property of such Things in him. Otherwise it shall be intended he has no property not even after a Verdict And the reason is as clear that there may be two Intendments and that which is against the Plt. shall rather be taken because he ought to make the Cause of his Action appear very Clear upon the face of his Declaration

But in the Case at Barr the Declaration is for Breaking the Plts. Close and burning a Tobacco House then and there being Now after it is say'd that the Close is the Plts. Saying likewise that the House in the Close is the Plts., wou'd have been mere Surplusage. For if the Land was the Plts. it is a necessary Consequence that the House upon the Land is his, against which there can't possibly [116] be any Intendment as in the Cases of things severed from the Freehold

For supposing a Man is Seised of an Acre of Ground of the value of 10£ & a House upon the Land of the value of 10£ and he Grant the Ground without mentioning the House, that the House will pass with the Land I think can't be denied for this see 2. and 123. And upon the Reason of this difference I take it clearly to be Law That if the Plt. in Trespass Declares for breaking his Close and taking and carrying away, or destroying any Thing which is part of the Freehold, tho' he doth not alledge it to be his the Declaration will be good even upon a Demurrer and fortiori after a Verdict. For tho' the Law requires a good deal of Exactness in setting forth a Cause of Action it requires nothing Superfluous or unnecessary

In the Case of Holland & Ellis 1. Vent. 278. The Plt. declared for Breaking his Close, treading down the Grass and carrying away divers Loads of Wheat there being, and after a Verd't it was moved in Arrest of Judgment that the Declaration did not mention whose the Loads of wheat were and it was Adjourn'd. But Ventris. Notes that it was not there growing

Same Case is cited 2. Lev. and there it appears that the Judgment was stay'd and Jones Attorney General who say'd he moved the Case again upon the Judgments in Terrys Case (there resisted) *resisted*

But in the 3. Rob. 524. the same Case is Reported and that Judgment was stay'd and it was say'd by Wylde and Agreed by

the others that if the Declaration had been for breaking his Close and carrying away divers loads of Wheat, there growing it wou'd be intended the Plts. But being of Loads it is severed and may be the Goods of a Stranger

And this is an Authority full in point to maintain the Decl. in the present Case and proves the difference between declaring of any Thing Severed and what is part of the Freehold Vid. Cro. Ja. 129.

In the Case of Gilliam and Claton 3. Lev. 93. For breaking his Close and pulling up and carrying away 200 Post fixed in the Ground. No Exception is taken that they are not mentioned to be the Plts. posts, besides there are Precedents which justify this Declaration 1. Mod. Inrandi 384. Declaration in Trespass for breaking Plts. Close and cutting, and carrying away several Trees there lately growing without saying they were the Plts. Lillys Int. 439. Declaration in Trespass Clausum fregit and consuming the Grass and Corn in the same Close growing and being without saying his Grass Wherefore notwithstanding this Exception the Plt. ought to have Judgment

Obj. 2. Perhaps another Exception may be taken that the value of the House is not mentioned

Answer. But that is nothing but form and not material In the Case of Usher and Bushel 1. Sidf. 39. Adjudged in Trespass for Goods and [117] Chattles omitting the price or value is helped after a Verd't by the Stat. of Jeofails

Same Case 1. Keb. 53. but nothing of this Point, Tho in the Case of Wood and Smith Cro. Ja. in Trover it was held that omitting the price or value was not helped by the Stat. by two Judges ag't two 129. 130. But in the Case of Bagshaw & Toward. Cro. Ja. 147. It is say'd that it is only matter of Form And so it is Adjudged between Bradford & Ramsay Cro. Ja. 654. and that is Aided by a Verd't

Obj. 3. Perhaps it may be Objected that the Cause of Action is a Felony and therefore the Plt. ought not to have Judgment

Answer. To this I must observe that upon the face of the Decl. no Felony Appears nor is there any Special Verdict in the Case, how it appeared upon the Evidence I don't know But in the Case of the Widow Lutterell vs Reynell and al. 29. Car. 2. 1. Mod. 283. Where the Defend'ts were found Guilty in an Action of Trespass for taking several Sums The Attorney General excepted to the Evidence that it amounted to prove the Defts.

guilty of Felony and the Law will not suffer a Man to Smooth a Felony and bring Trespass for Robbery before the Party has been tried and Acquitted or found guilty

But the Lord Chief Barron Montague, declared and it was agreed that it shall not lie in the Mouth of the Party to say, He is a Felon and not Guilty of Trespass. And this Opinion is Agreeable to the old Books, and not contradicted by any Opinion that I know of Tho' the Reporter says Perhaps if the Fact appeared upon the Declaration it might be otherwise and puts a Quere what the Law would have been, if it had been found upon a Special Verdict Which is a Questioning the Opinion of the Lord Chief Barron. For there can be no difference Whether it appears upon the Decl. or is found in a Verdict or is discovered upon the Evidence. So that it seems to me in this Case the Law is settled Braxton Cup. 22. Cited Stam (P. C. 28. a. 83. b. Says the Prosecutor may in the beginning Proceed either Civilly or Criminally at his pleasure for he may demand his Goods lost by the Testimony of good Men, altho' they are Stolen and he may afterwards Prosecute the Party as a Felon by Appeal

But if he first Prosecute his Appeal he shall not afterwards descend and bring a Civil Action

Now we shall see how this agrees with the Opinion of the Judges in Cases where this Point has come in Question Serjeant Rolls in his Abr. 556. pl. 19. Says it was Adjudged in Days Case that if a Stranger takes my Horse or other Goods and sells them to I. S. No Action of Trespass lies against him And he gives the Reason, because it appeared to the Court to be Felony which belongs only to the King to Punish, for which he Cites Huggins Case Immediately afterwards he Abridges Huggins's Case and it appears there was an Action of Trespass for beating the Plts. Wife so that she Languished six Weeks [118] and then died. Which being Felony the Action did not lie. The same Case is Reported Noy. 18. and the Judgment was given Accordingly.

But Janifield¹ gives another Reason, because the Wife was dead and she ought to have been joined, and there is no doubt but that Case is good Law. For Braxton excepts the Case *de morts Nominis*

In the Case of Markham and Cobb. 2. Rol. Abr. 557. pl. 52(22²)

¹In MS. of Congressional Library, p. 118, it seems to be "Tarnfield."—R. T. B.

²This insertion is William Green's.

Noy 82. and Latch 114 (144¹). an action of Trespass was brought for breaking his House and taking and carrying away 3000£ of Money in Baggs. The Deft. Pleaded that he and another were Indicted for the same Offence, and Convicted of Felony and had his Clergy according to Rolls the action did not lie. Because when it appears that the fact was Felony, the Party ought to Prosecute by way of Appeal to have his Goods again, or to Prosecute by Indictment and then to have his Goods by the Stat. 21. Hen. 8. for otherwise nobody wou'd Prosecute a Felony but wou'd only have Trespass for his private Interest

By the Opinion of Doddridge and Whitlock ag't Jones as Rolls Reports But According to the Report of Noy Jones was of Opinion that the Action did not lie And Doddridge and Whitlock that it did lie Because an Indictment was a Suit of the Kings who cou'd not hinder the Subject of his right And by the Report of Latch it seems the three Judges were of one mind that the Action did not lie at first But Jones afterwards Changed his Opinion

Justice Jones reports the same Case Sr. W. Jones 147. which ought most to be depended upon where he tells us Doddridge and Whitlock gave Judgment for the Plt. in the Absence of the Chief Justice for a default in Pleading and not upon the matter of Law But as to the matter of Law Doddridge and Whitlock *Prima facie* were of Opinion that the Action did lie and the Party had his Election to bring Trespass or appeal And since he had not brought an Appeal he shall have Trespass Jones of another opinion. One of his Chief Reasons were (was²), that the Matter being found by Verdict that it was Felony The Averment Cou'd not be against it that it was Trespass, but if the Party had been Acquitted it wou'd have been otherwise and in the Conclusion he says what he had say'd to this Point was only *Argumenti gratia* and not his Absolute Opinion. So say'd the Other Judges But he puts in a Quere and says it is a point of great Consequence of both sides

So the Law Notwithstanding the Case was unsettled Whether a Man that is robbed after Convicting the Party may have an Action of Trespass for his Goods But the reason of the Case seems very strong that he may For surely Justice Jones's difficulty, how a fact that [119] had been found Felony cou'd after become

¹This insertion is William Green's.

²*Id.*

Trespass is easily Answered Being with respect to the King and Government Felony, and with respect to the private Interest of the Party robbed a Trespass only. So it is ruled in Dawkes and Covonaugh's Case 2. Rol. Abr. 556. and Styl. 346.

And as to the other point, Whether before a Trial the Party robbed may have Trespass I can see no difference whether the offender be tried before or after bringing such an Action. Tho in Rol. Abr. *ubi. supra* pl. 23. it is say'd If the fact upon Evidence appears to be Felony the Action does not lie. It does not appear it was so Adjudged and Lutterols Case is an Authority in point that he may

But it was only Objected that it might be intended that the House was Leased But the Exception was overruled and Judgm't for the Plt. by the whole Court except one

¹DIGGES *vs* LILLY. *Tres. on Case Fr Plt.*

A deceit sufficient ground of the action, exclusive of the word "assumed."

The Plt. Declares That upon a Day and year at *R — n* [*sic*] bought of the Deft. 3 Hhds of Tob'o then immediately to be delivered for 20£ yet the Deft. tho' often required had not delivered the Tob'o, but doth falsly and fraudulently detain the same

Upon not Guilty the Jury have found for the Plt. and 10s Damages and now the Question is whether the Plt. shall have Judgm't upon this Declaration

And I think the Declaration is good, the Action being grounded upon a Deceit in refusing to deliver Goods after the Plt. had bought them. For tho' the Plt. might have Declared upon the Mutual promises which are implied in every Bargain and so have founded the Action upon a Breach of Promise yet where there is a deceit he is at liberty to declare upon it 1. Ro. Abr. 10. 21. H. 7. 41. p. *Tineus*. If a Man sells Lands for a Certain Sum to J. S. and promise to enfeoffe him, tho he do not Enfeoff another but keeps it himself yet deceit lies against him 20. H. 6. 34. which Fr Roll is *Contra* Deceit is brought for Enfeoff'g a Stranger after a Bargain made with the Plt. for the Purchase and an Agreement to Enfeoff him and by the

Opinion of most of the Judges it is maintainable, and Aysiough there says there is no difference betwe'n Enfeoffing another and retaining the Land himself and that in neither Case Deceit lies but Covenant. Old Book of Entries 48. b. There is a Precedent of a Decl. in deceit wherein the Plt. Declares that he bo't of the Deft. 4 Acres of Land for a certain Sum of Mo in hand p'd & the Deft. promised to deliver Seizin thereon within a certain time then past yet he *falso et fraudulenter* Enfeoffed one & refused to deliver Seizin thereof to the Plt.

[120] Robinsons Entries 29. There is a Precedent where the Plt. declared upon a Bargain for all the Wool growing upon the Defts. Sheep to be delivered to him at a price agreed every Year during their lives And that the Deft. for several Years sold it to Persons unknown Plita General and Pial¹ 14-19. There are two other Precedents of the same sort

Obj. And tho' there is an assumpsit laid in those Declarations to deliver the Wool it was not so Essential but that it might have been omitted and any other word Expressing the Agreement wou'd have been as well As in this Case the Plts. declaring that he bought of the Deft. three hhds of Tob'o then immediately to be delivered for so much Money is as Expressive as if it had been say'd the Deft. Promised to deliver it

In the Case of Kirby & Coles Cro. Eliz. 137. The Plt. declared that there was a Communication between him and Cooper for the Mast'g Certain Hogs and in Consideration that the Plt. gave Cooper three Shillings for every hogg well Masted the Deft. promised they shou'd be well fattened and redelivered, to which Promise the Plt. giving Credit delivered 50 Hogs, and because they were not redelivered the Action was brought. After a Verd't it was moved in Arrest of Judgment that there was no Consideration to Charge the Deft. But by Wray & Clynch ag't Gawdy the Action is maintainable being grounded upon the Promise and Deceit Indeed where the Promise is the sole foundation of the Action there the word Assumpsit is material As in the Case of Buckler and Angel 1. Sidf. 246. The Plt. Declares that in Consideration that he had procured I. S. to Surrender a House the Deft. Solveret the Plt. 10*£* and after a Verdict Judgm't stay'd because no Assumpsit is laid

Yet same Case is Reported Raym. 123. and there Chief Justice Keiling held it only matter of Form and S. C. is Re-

¹W. G. writes above — *et special* — for "and Pial," as in the MS.

ported 1. Lev. 164. There the Exception is that as there was no Promise Non assumpsit was no Issue to be tried and for that Reason Judgm't was Stay'd

Vid 2. Keb. L. P. Adjourned and 1. Sidf. 306. Mr. Holloway Cited Plowd. 303. 309. If a Man buy a Horse and pay no money no Action lies for the money for the Horse and here is Nud Pact Motion overruled.

October 1729

[121]

¹MUTLOW vs BALLARD Case Fr Plt.

"Pocky Whore" actionable.

Case for Speaking the following Words "You are a Pocky Whore and are now full of the foul disease And your Father is Obligated to keep Doctors to keep you Salved up with Plaisters, insomuch that they drop from you as you walk the Earth. And also your Father has Doctors frequently at his House to keep you Salved up And now you are full of the foul Disease and have got so many Plaisters that they drop from you as you walk along and you are Offensive" Of w^{ch} the Deft. is found Guilty and £18 Damages assessed. Now the Question is Whether the words are Actionable and without doubt they are.

All words charging either Man or Woman with having the French Pox have ever been held Actionable, tho' to say of one he has the Pox without other words to Explain that he meant the French Pox is not Actionable

Pocky Whore can in the natural Signification of the words signify nothing else but that she has that Pox so incident to Whores. That it has been Adjudged between Hunt and Jones. Cro. Ja. 499. that Scurvy Pocky Whore are not Actionable and Cro. Ja. 514. That Pocky whore is not Actionable yet between Marshall and Chickall 5. Sid. 30. you are a Whore and a cursed Pocky Whore Adjudged Actionable For where Whore and Pox are joined together it is apparent that the French Pox is intended Being Salved up with Plaisters Implies her having Sores which are the Consequence of the Veneral Pox and having a Doctor to lay on the Plaisters is still stronger

But saying that she has the foul Disease is the same thing as saying that she has the Veneral Pox, for the Synonymous

Terms and taking all the words together it cannot be intended that anything else was meant and they shall be taken according to Common Acceptance. Skinner 183. 184.

Milnors Case 1. Rol. Abr. 66. p. 16. and Cro. Ja. 430. Mrs. Milnor is a Whore and has the Pox and had holes in her face that she might turn her fingers in them and Ring The Apothecary gave her a Diet Drink therefore take heed how you drink with her Adjudged Actionable, for all the words joined together it plainly appears that he intends the great Pox

Mod. Cases. 148. It is say'd by the Court that if it were a new Thing it were reasonable the Word Whore shou'd be Actionable. For no greater misfortune can befall a young Woman whose well being depends upon her having a good Husband than to be reputed a Whore

[122] But the Authoritys are too many and too great to run Counter to them And Leving in Skinner 83. Says he was for taking Words in their natural sense and not according to the Witty constructions of Lawyers, but According to the Apprehension of bystanders.

P. Deft. It was objected, first, That Pocky Whore are not Actionable because spoken adjectively 2. Foul disease can't be explained by an Innuendo to mean the French Pox. 3. And the rest of the Sentence are nothing because she may have Sores from another Cause than the French Pox, and the case in Cro. Ja. Cited and 4. Co. Jamesses's Case, full of the Pox, innuendo the French Pox, the innuendo can't alter the meaning of the Words and therefore not Actionable Mod. Cas. 24, Baker and Pierce also Cited Fr Holt, there is no rule for Words. every Case for words stands upon its own feet and the Opinions of later times have in many Cases been different from the former Days Fr Holt

But the Motion was overruled by the whole Court.

¹BOOTH *vs* DUDLEY Ejectm't *Fr Deft.*

Some conversation about the Act of Lim'on—a plt's laying lease & entry within 20 years shall not save Act of Lim'on altho deft. is obliged by rule of Court to confess lease entry & ouster — convey'c by husband of wife's land binding on heir with assets.

In Ejectment upon a Lease made by Robert Dudley Upon not Guilty this Case is agreed between the Parties "That Peter

Ransom was seized of 1100 acres of Land having Issue, James, George and Wm. by his last Will and Testam't. (a) Devised 350 Acres the Land in Question to George and his Heirs forever and died

George entered and was seized and by his last Will & Testam't. (b) Devised this Land by the Name of 500 Acres to Eliz'a his only Child, and if she depart this Life without Heirs of her Body then his Brother James Ransom and his Heirs to enjoy his Daughter's Legacy. But before this last Clause he directs that his Wife shall have the management of his Daughters Legacy (giving Security) during her Life, and if she should die during the nonage of his Daughter his Brother James should take care of his Daughter's Estate and several Chattles are given to her besides in the same Clause

George died and Elizabeth his Daughter and Heir entered and was seized and Intermarried with Rob't Dudley some time in the year 16. and they had Issue Rob't Dudley the Lessor of the Plt.

(c) Robert Dudley and his Wife by Deeds of Lease and [123] Release sell and Convey this 350 Acres of Land to James Ransom and his heirs with Warranty which Deeds were acknowledged in Gloucester Court but the Wife was not privately Examined.

Robert Dudley the Father died (e)

Elizabeth the Mother died (f)

James Ransom entered and was Seized and by his last Will and Testament (g) Devised the Land to his 3 Sons George, Robert and Peter, who by several Conveyances Conveyed the same to the Deft. And this is the Defts. Title And James Ransom and those claiming under him have been in quiet and undisturbed possession of the Lands in Question from the 16 of Aug. 1694 until the delivery of the Declaration in this Cause which was served October 5th 1726 And the Lessor of the Plt. hath Lands in fee Simple of greater value than the Lands descended to him from his Father Robert Dudley. Upon this Case I shall agree that Mrs. Dudley took an Estate tail and then the Questions will be only 1. Whether the Entry of the Lessor of the Plt. is not taken away by the Act of Limitation

2. Whether he is not barred by the Fathers Warranty with Assets and 1. I think he is clearly by the act of Limitation a'o 1710 in which the Words so far as it concerns this Case are

"That no Person or Persons that now hath or which hereafter
"may have any Title of Entry into any Land shall at any time
"hereafter make any Entry but within 20 years next after his
"or their right or Title hath descended or accrued or hereafter
"shall Descend or accrue, and in default thereof such Persons
"so not ent'ring and their Heirs shall be utterly Excluded
"and disabled from such Entrey after to be made." And there
is Saving Clause to Infants, Feme Coverts &c.

16 Aug. 1694 Now to apply this Act to the present Case by
the Conveyance from Rob't Dudley and his Wife to James
Ransom, no thing passed from the Wife she not being privily
Examined, but as to her it was void

20 Octob'r 1701 Then after her Husbands death her right of
Entrey Accrued and from that time the 20 years given by the
Act to be computed 17 years and 2 Months whereof were Lapsed
when he died

23 Dec'r 1718 And the Lessor of the Plt. being at that time
about 27 years of age he cou'd not make any Entry after the
20th of October 1721. when the 20 years were Complete and
the Decl. in this Cause was not delivered October 1726. But if
the Lessors Mother had been at the time of making the Act
under Coverture, then I shou'd think she might be Construed
to be under the saving Clause And indeed any other Construc-
tion wou'd be neither Grammatical, nor reasonable as it was
held by Lord Trevor Master of the Rolls and Ld. Chief Justice
Eyre in the Appeal between Heal & Ball [124] heard before
them in Aug't 1728. The words are "Provided neverth'ess
that if any Person or Persons that hath or shall have such right
of Title of Entrey be or shall be at the time of such right or Title
"first Descended or Accrued within the age of 21. years"
Feme Covert &c. that then such Person or Persons notwith-
standing the s'd 20 years are expired may make his Entrey
as he might have done before the making this Act so as it be
done by him or his Heirs within ten years after his full age,
Discoverture &c.

But for all that appears in the Case she was never Married
after the death of the Lessor's father, tho the truth is that she
afterwards married one Robert Dudley who died in the beginning
of the year 1710, then she lived a Widow a year or less and
married Thomas Elliot who died in the year 1716. Novem'r 19.
and she was Certainly discovert the 25th October 1710. when

the Act was made, so the time run against her from the death of her first Husband for it was her fault not to make her Entrey when she was sole after making the Act, and her disabling herself by the third marriage shall not excuse her Laches And the Lessor had almost 3 years after her death to make his entrey which he neglected Wherefore he being of age is without excuse likewise

Indeed the Plt. has taken care in the Declaration to lay the Lease and Entrey within 20 years. But notwithstanding that and the confession of Lease, Entrey and Ouster it appeared by the Record that the entrey was not till October 1726. And the Confession of Lease, entrey & Ouster by the Deft. which he was bound by Rule of Court to do shall not prejudice him. So it was in a Case much stronger than this Clerk & Philips's or Clerk & Pywell Vent. 42. Saund. 319. 1. Mod. 10. 2 Keb. 553.

But before the hearing of the Cause we found that the Mother married Elliot 21. Sep'r 1710 and was under Coverture at the time of making the Act of Assembly, and we amended the Case accordingly

For the Declaration was delivered about a Month before the 10 years expired after her last discoverture

2 The Warranty of the Lessors Father with Assets is a bar in this Case. If the Husband in the Life of the Wife, Aliens his Wifes Land with Warranty and Assets descended to the Heir from the Father the Heir is barred by the Warranty Lord Coke Comment upon the Stat. of Gloucester 2. Inst. 294. And by the Common Law Warranty without [125] Assets was a bar. So Warranty with Assets is a bar of the right in Tail and is not restrained by the Stat. *de donis* Co. Litt. 374. b. 393. b.

And there is no difference whether Lands of the Wife so Alien'd be Intailed or not This being clear tho' the Warranty is not Pleaded being found in Special Verdict it shall bind the Lessor of the Plt. and is a good Title in the Deft. which is Admitted 10 Co. 95 b. Seymors Case In Kind and Fox's Case Cro. Car. 145. and is revoked in Smith and Tyndals Case 2. Salk. 685.

Obj. But perhaps it will be objected That the Conveyance to James Ransom is a harmless Conveyance and pass'd nothing by Transmutation of Possession But only what the Father of the Lessor cou'd lawfully pass, to wit a Descendable freehold during his Life and upon his death the Warr was Extinct and cannot bar the Estate Tail which was not displaced or turned

into a Right by the Lease and Release And I must own this will be an Objection of some Weight and that Symon's Case in 10 Co. 95 is an Authority in point against me And *vide* 1. Saund. 261. Carter 210. Cro. Car. 429. 1. Bulst. 165. and 2. Bulst. 34. which proves that nothing passes by such a Conveyance but an Estate for Life of the Father.

To this I answer That (allowing the Objection in the General) in this Case the Lease and Release of the Lessors Father Acknowledged and Recorded in Gloucester County Court shall operate as a Feoffment by Virtue of the Act of Assembly of 1710 for Settling the Titles and Bounds of Lands which Enacts " That all " Deeds and Conveyances whatsoever where Livery or Seizin " might Otherwise have been required heretofore *bona fide* " by any Person or Persons for any Lands &c. within this " Colony where the Person or Persons to whom the same have " been Conveyed have entered thereupon and they and those " who have their rights do still Continue in possession thereof " by virtue of such Deeds & Conveyances shall be Deemed. " Adjudged and taken and are hereby Declared to be to all " Intents, Constructions and purposes as firm and valid in Law " and shall enure and take effect as fully and Absolutely as if " Livery & Seizin had been thereupon made in due form of Law.

Upon the appeal between Ball & Heal from a Judgm't of the Gen'l Court in April 1728 in a Verdict of right Where the Tenant Pleaded a Bargain and Sale with Warranty of the Demandant's Father it was Argued by the Tenants Council that the Bargain & Sale shou'd Operate a Feoffment by this Act and the Lord Trevor seemed of that¹ — [four lines here undecipherable. W.W.S.]

[126] themselves to Warrant and forever defend the Promises) makes no Warranty and cited Let

2. Deeds of Lease and Release dated the same Day are void and the Warranty here is contained in a Release dated the Day of the Lease wherefore the Warranty is void and Hob. 22. Cited to that purpose 3. And the Stat. 32. H. 8. against discontinuance was insisted upon

But the Court Adjudged the Lessor of the Plt. was barred by the Warranty of his Father with Assets

¹The MS. of the Congressional Library, p 216, shows that these words are as follows: " opinion if it had been pleaded as a settlement. But Hopkins for the petr. only objected that the words (doth oblige)." — R. T. B.

1 MECKINS & VADIN *vs* BURWELL and HOLDCROFT Ejectm't Fr Deft.

Exposition of a Will — precedents of Wills set aside for uncertainty — of bequests passing only an Estate for life — of recovered in Eject. set aside, because one who had no title, was joined in the lease or deton.

Ejectment upon a Lease made by Meekins & Vadin of several parcels of Land in James City County

Upon not Guilty in the County Court this Special Verdict is found. That Thomas Meekins was Seized in fee of the Lands in Question and having four Children, Tho's, W'm Roger and Mary 7. Feb'y 1669. by his last Will dated as before Devised one Parcel to Tho's and his Heirs for ever and gives him a Legacy besides, another Parcel of the Land to William and his Heirs for ever and gives him a Legacy And another Parcel of the Land to Roger and his Heirs for ever with a Legacy

He gives a Legacy to his Daughter Mary and then adds this Clause " If it shall happen that any of my said Children die " with't Issue then that share shall equally be divided among " those that Survive. But if all my Children die without Issue, " then my Lands shall fall to my Heirs in England"

The Testor, died, Tho's W'm and Roger enter into their respective parts William died without Issue before the year 1682 (the certain time *non constat*) Tho's entered into his part and by Feoffment dated 7. 9'ber 1682 Conveys it to Humphrey Browning and W'm Brown in right of Roger Enters upon him, Browning brings his Ejectm't and by the Judgm't of the General Court 28 Sep'r 1683. recovered The Court holding that Tho's had a Fee in Williams part Feb. 1698. Browning Enfeoffs Lewis Burwell & 5 April 1700 Roger by several Deeds of Lease and Release Conveys [127] 438 Acres and 68 acres being his part as I suppose to Lewis Burwell

Lewis Burwell by his Will devised these Lands to his Son James Burwell and from him it descended to one of the Defendants Baron Burwell

Thomas Meekins the eldest Son of the Testor and his Wife by Deed 15 October 1684. Conveyed 150 Acres (I suppose of his own part) to Robert Martin in Fee

Martin 29. of Xber. 1691. Conveyed to Alex. Walker and from him it Descended to the Deft. Walker and the Deft. Hold-

croft claims a third part of it in right of his Wife the late Wife of Alex. Walker for her Dower. Tho's Meekins died 2. March 1721. leaving Issue — Meekins one of the Lessors his Son and Heir

Roger Meekins died 2. March 1723. with't Issue the other Lessor Vadin is Son and Heir of Mary the Daughter who died *Anno* 1723. In the first part of the Will of Thomas Meekins the three sons took an Estate in fee Simple in the several Parcels of Land Devised to them which shall not be restrained by an Estate Tail unless the Testators meaning in the Subsequent words appears to be so If they be dark and doubtful the Fee Simple Estate stands uncontroverted *vid.* Polf. 426. So the Question will be Whether the latter Clause be so clear as to shew the Testator's Intent, That instead of a fee simple they shou'd have an Estate Tail in their several parts or what his Intent was

The words are very doubtful and uncertain and it is very difficult to Collect the Testors. intent'n from them

The first part of the Clause " if any of my Children die without " Issue that share shall be equally divided among those that survive is very uncertain and of a doubtful Construction

The other side will insist that this part of the Clause shall be Construed, That upon the death of one of the Sons without Issue, the Lands Devised to him shou'd remain to the other two Sons and the Daughter So upon the death of another of the Sons without Issue his part shou'd remain to the Surviving Son and the Daughter

And it must be upon such a Construction that Vadin one of the Lessors of the Plt. can have any right to part of the Lands in Question. But it is clear from the whole scope of the Will that the Testator Intended the whole Lands for his Sons in the first place. For the Daughter had no Land given to her and the Daughter by a possible implication only cannot have any Estate in Remainder by this Clause so as to Disinherit the Heir at Law; Which is a settled point since the Case of Gardener and Shelton in Vace 259. There the case was upon a Will

[128] If my son George and my Daughters Catherine and Mary die without Issue, then my Lands to remain to my Nephew and his Heirs forever And it was Adjudged that the Daughters took nothing by the Will, for where the Words of a Will are Ambiguous & doubtful Construction they shall not be interpreted to the disinheriting of the right Heir

Therefore unless no other Construction cou'd possibly be made the Dauter can take nothing in Rem'r by this part of the Clause.

But the Testator seems rather to have intended by the Word (share) That in Case of the death of any of his Children, the money and Goods he had before bequeathed to them shou'd be equally divided among the Survivors and not the Lands. For in the latter part of the Clause he says, if all his Children die without Issue his Lands shall fall to his Heirs in England, whereby he plainly excludes the Lands in the other part of the Clause Besides upon the death of the Daughter without Issue no Lands remained to the Sons which makes the Presumption Stronger, that it was not meant to extend to Lands, but to Personal Things, for he must intend a reciprocal Benefit to the Survivors upon the death of any one of the Children And it may be Objected that there be no Rem'r of a Chattle, so the Words will be useless unless they Relate to the Lands

That can be no Argument in this Case, for the Testator undoubtedly by these words " If any of my s'd Children shou'd die &c. which extend to the Daughter as well as the Son must intend upon her dying without Issue that the Legacy shou'd remain to her Brothers And ignorant People who make their Will without Advice do not know but that their Goods may be disposed in this manner

But if this part of the Clause shall relate to the Lands the Daughter took nothing by implication and the words gave the two sons only an Estate for Life, the fee simple descending upon the eldest drowned [*sic*] his Estate and he might sell his reversion in Rogers part So that way we have a Title to Williams Land

For this vide Skinner Middleton's & Swans Case 339 Where a Devise was to H. and his Heirs and if he die before such an age his share shall go to the rest of his Children younger: and Share and Share alike

The younger Children had but an Estate for Life So in Skinner 363 *Totam illiam partam* with't Limitation of any Estate carry's but an [129] Estate for Life. But they will rely upon the Subsequent words " If all my Children die without Issue, then " my Land to fall to my Heirs in England " That they make an Estate tail to the Sons with cross Rem'r. To that I answer

that Allowing the former Sentence not to extend to the Lands which is the most consistent Interpretation: Or if the Dauter took nothing by the first part of the Clause which I take to be very clear These Words must be void, Because as the Daughter has no Estate Limited to her before it is uncertain in what Order the Rem'r shall go Whether the Daughter shall take a joint Estate with the Surviv'rs upon the death of one of the Sons without Issue; Or whether she shall wait till all the Sons die without Issue; and tho' Wills are to be favoured in their Construction as far as may be. Yet where they are so uncertain that the Intention cannot be Collected they ought to fall, for Men frequently upon their death Beds write Nonsense and it is not possible for the Judges to sift out their meaning tho' they rack their Brains ever so much. Therefore in such Cases their words shall rather be rejected than preserved, and for the uncertainty of this last Sentence in our Case it must be rejected. To which purpose there are several Authorities.

In the Case of Taylor and Sayer Cro. Eliz. 742. A Man Seized in fee of Lands Devised them to his Wife for Life and after her death to his Issue when he had several Children, and because it was uncertain which of his Issue he intended the Devise was held void. In the Case of Hanchet and Thekwall 3. Mod. 104. There the Devise was to one of his Sons for Life Rem'r to his four Daughters Share and Share alike (without Limitting any Estate) And Price and Warran which is same Case in Skinner 266. And if all my Sons and Daughters die without Issue, then to my Sister and her Heirs. And because he had another Son who took no Estate by the Will It was uncertain in what Order the Estate shou'd go, there being no Appointment who shou'd have the part of any of the Daughters dying without Issue. Therefore it was Adjudged that the Daughters had no Estate Tail, but the Words, if all my Children die without Issue were void which is a Case in point if the first part of the Clause doth not extend to the Lands.

Then upon the whole matter the Estate given to the three Sons by the former part of the Will, will not be affected by this Clause. So Thomas and Roger had a fee Simple in the Lands in Question and our Title under them is good. So the Judgm't of this Court was 46 years ago.

[130] But if it be construed that both parts of the last Clause

shall extend to the Lands, then I think upon the death of William without Issue his part vested in Tho's and Roger in Tail and that the Daughter cou'd take nothing by Implication till after the death of both other Brothers without Issue. So the Lessor Vadin can have no Title.

And the other Lessors Entrey as to half of William's part is taken away by the Stat. of Limitation, for Rogers right of Entry Accrued 47 years ago at least, And if the Daughters took anything in Remainder upon the death of William her issue is likewise barred.

So that the Deft. Burwell which way soever the Will is construed has a right in a Moiety of the Land Conveyed by Thomas Meekins to his Grand Father.

But the Conveyance from Browning to Tho's Meekins was a Discontinuance of the Estate Tail; So the entrey of the Lessor of the Plt. is taken away for the whole Lands in Question.

Upon the Argument of this Case The Judgment of the Gen'l Court between Browning and Browning 1683 was in the first place insisted on and that the recovery then did bind the right of and Interest of Roger in Williams Land and the Lessor Meekins cou'd not falsify it in the point tried unless it appeared that there was a joint Defence made. This was Argued upon a Saying Obitor of the Lord Chief Justice Holt in Williers and Harris's Case Salk 258 and Farresly 67.

But the Court over ruled us in this point because it did not Appear that any Counsel appeared for Roger.

Then upon the Merits of the Cause the Court were of Opinion That the three Sons had several Estates Tail in their Lands, and that Thomas and Roger had an Estate Tail in W'ms part and that the Daughter took nothing.

But they held that as to a Moiety of Williams part the Entrey of the Lessor of the Plt. was taken away by the Stat. of Limitation 1710. And the Judgment was to have been entered upon this Opinion.

But I excepted to the Declaration That the Plt. having Declared upon a Lease made by Meekins and Vadin who took nothing in the Land cou'd not recover.

And I cited the Case of England and Long 2. Rol. Abr. 719.

And upon this Exception the Judgment was reversed for the whole.

October 1729

[131]

¹MANSEL BLACKGROVE *vs* THOS. ADDISON. *Ejectm't Fr Deft.*

A foolish story—Land given on a condition precedent—it must be previously performed.

Upon a Lease of one Messuage and 190 Acres of Land with the Appurtenances, this Special Verdict is found.

That William Ellis was seized of the Lands in Question and by his last Will and Testament bearing date 28 January 1720 Devised the same as follows “ I give and bequeath unto my “ Wife Ann the use of all my Lands during her natural Life and “ after her death I give the Lands in James City that is mine to “ Mansel Blackgrove and his Heirs for ever. Item I will and “ desire that the Land before give to M. B. after my Wife’s “ decease be not his without he Comply with my Will and desire “ hereafter and the same Agreement between him and me “ appear in writing from under his Hand after my Decease.

That at the time of making this Will the Testator signed a Writing Intituled Articles of Agreem’t between him and Mansel Blackgrove importing that B. was to build upon these Lands a Dwelling House of the Dimensions there mentioned and repair a Tobacco House between the date of that Writing and Christmass following And upon his performing this he declares he had given him the Land by his Will after the decease of his Wife, otherwise by that writing he debars the said B. and his Heirs from that Legacy.

Ann Ellis died before the bringing of this Suit and that M. B. the Lessor of the Plt. before her death had notice of the s’d writing and about 12. Months after the death of the Testor, but has not performed the Work, nor was not required to do it.

There is no Title found in the Deft. But Baron Burwell has Petitioned for a Grant of the Lands as vested in the King by Escheat.

This is a very easy Question The writing operates with the Will whereby the Lands in Question are Devised to the Lessor of the Plt. upon a Condition Precedent and that Condition is not performed tho’ he had Notice before the death of the Wife so nothing vested in him.

But as to the point of Notice not having Notice will not

be Excuse the performance of a Condition in the Case of a Stranger Tho it is otherwise in the Case of the Heir at Law.

And the Court gave Judgm't Fr the Deft.

[132]

October 1729

¹ABBOT *vs* ABBOT. *Trover for several Negroes Fr Deft.*

Many prects. of plt. in trover &c. being barred of new action by jug'ts. ag'st him — of his being barr'd by Jug't in a diff't action for the same thing if former suit dismissed no bar.

The Deft. pleads in bar an Action of Trover brought by the Plt. formerly for the same Negroes and upon not guilty Pleaded a Verd't was found against the Plt. And Judgment that his Suit shou'd be Dismiss't, to which the Plt. hath Demurred That this is a good bar will appear by the Resolutions of the Judges in England in many Cases.

Ferriers Case C. Co. It was resolved when one is barred in any Action Real or Personal by Judgment on Demurrer, Confession Verd't &c. he is barred as to that or the like Action of the like nature for the same Thing *Expediit, republice utsit finis lituem* [sic] S. Case is reported, Cro. Eliz. 667. and there it appears that in an Action of Trover the Deft. pleaded that the Plts. and another who is since dead had brought Trespass against several for the same O, who justified the taking as Heir of in the right of the now Deft. And tho' the Deft. is a Stranger to the Record yet being privy to the Trespass he may Plead it and is a good bar. By Walmsley and Kingsmill against Anderson and Glanvil who hold that if the Cause of Action was the same, the Deft. might Plead it. But a Verdict or Demurrer in an Action of Trespass cou'd not be a bar in Detinue which is an Action of a different nature, which Walmsley Agreed where the Verd't was upon Not guilty But when a Title is Pleaded in an Action of Trespass and by reason of that Title, the Plt. is barred by Verd't or Demurrer The Interest is thereby bound and the Plt. barred Agreeable to this Opinion Walmsley in the like Case of Putt and Roster 2 Mod. 319. a Judgment is reported to have been given But that Reporter seems to have mistaken the Case for S. C. in 3. Mod. 1. and Raym. 472. The Verd't Pleaded in Bar was upon not Guilty And therefore it was Adjudged for the Plt.

¹S. C. MSS. Virg. Rep. in Congr. Library. [Note by W. G.]

But it is Admitted in all these Cases that where an Action is brought and the Plt. barred by Verd't or Demurrer that shall be a barr to any Action of the like nature for the same Thing And in the Case of Lechmere *vs* Toplady 2. Vent. 269. In Trover it was Pleaded that the Plt. brought Trespass before for the same Goods To which the Deft. pleaded not Guilty and a Special Verdict was found Where upon a Demurrer it was Adjudged that the Plea in bar was good. But in regard to the Case of Putt and Royston above mentioned & the Importunities of the Plt. the Court gave leave to speak further to the [133] Case the next Term And in the Case of Lipping and Kidgwin 1. Mod. 207. Fr North and agreed by the other Judges where the right of the matter is found for the Deft. in one Action the Plt. shall never bring his Action about again For he is estopped by the Verdict.

Obj. But perhaps it may be objected that the Judgment of the Court in this Case in the former Action That the Plts. Suit shou'd be Dismissed is no Judgment and therefore no bar, For the Judgment ought to have been that the Plt. take nothing by his Bill. As it was Adjudged between Level & Hall Cro. Ja. 384. Cited 2. Mod. 294. 295. Answer. This is the manner of entring all Judgments in this Country and if it is not right all Judgments must be void. And upon this Exception the Plea was held no Bar, by the whole Court.

So we see how the People of this Country suffer by Ignorance of the Clerks, for till within these three Years no other Judgment was Ent'red by the Clerk of the General Court And it was by my Advice that since that time Judgments have been entered that the Plt. takes nothing by his Bill, but in the Country Courts there is no such Entrey yet.

¹BURGESS Admx. *vs* CHICHESTER Admr. *In Chancery Fr Plt.*

The limitation of a chattel. Many cases cited.

William Fox by his Will gives the use and Benefit of his Personal Estate to his Wife (now Deft.) during her natural Life and that after her death the same shou'd remain to his Nephew David Fox and the Heirs of his Body Lawfully begotten But if it shou'd so happen that his said Nephew shou'd not be alive, nor have any such Heirs as aforesaid at the time of the Decease

of his said Wife. Then the Testor. gives his Estate aforesaid after the decease of his s'd Wife to several others and to their Heirs viz. To Mrs. Burgess and all the Daughters of G. H. which shou'd be living at that time.

David Fox is dead without Issue and Mrs. Burges is his only Sister and Adm'x And the end of the Bill is to have a Discovery of the Estate and Security that the same shall not be Imbezzled

To which the Defts. have Demurred for that it appears by the Plts. own shewing that David Fox is dead and the Testor's Wife is now living whereby the Gift of him is void and no right in Law or Eq. is vested in the Sister who is his Sister and Adm'x

The Question is Whether anything is vested in David Fox If [134] Nothing vested in him the Plts. have no Equity.

As to this the old Books are That of the use of the Chattle to one for Life and after his death to another, That the first hath only the Occupation and the other the property And upon that difference the Rem'r of a Chattle has often been held Good

Bud.¹ Abr. Tit. Devise 13. 37. Hen. 6. 30 And the Case of Lord Hastings ag't Douglas. Cro. Car. 343. Owen. 33. Then by this Rule David Fox had the property of this Estate of his Uncle vested in him But the subsequent Clause upon the Contingency of his dying in the life time of the Wife to whom the use is given, or not having Issue at the time of her death gives another Rem'r which is a Double Remainder

But this Remainder must be void and the Testators Intention to Intail his Personal Estate disappointed for the Law will not suffer Chattles to be disposed of in this mann'r Cases for this point are Whitmor's Case 1 Vern 326 Mr. Whitmore by his Will Devised the Surplus of his Personal Estate being 30000£ to the Lord Craven during the Minority of William Whitmore his Son to the use of him and his Heirs Lawfully descended from his Body and in Case he died during his Minority without Issue to the use of the Children of his Sisters

The Son died without Issue being of the age of 18 but was married and by his Will devised all his Estate to his Wife whom he made his Exec'x who brought her Bill to recover this personal Estate against the Sisters Children and Obtained a Decree And tho the Lord Chancellor Vernon (1 Vern 347) Declared his Opinion that upon the whole complexion of the Will the Minority of the Testors. Son determined when he attained 17 years of

¹The word is " Bro." MS. of Congressional Library p 225 — R. T. B.

age Yet he says had that been Otherwise it was a Trust vested in the Son and the Rem'r over was void And withall said that if the matter in Question had been but for 100£ it wou'd not have held an Hour's debate

S. C. is reported 2. Vent. 367. & Cha. Rep. 167. but not so clearly as to this point Broadhurst and Richardson 2. Vent. 349. A man had Issue 3 Daughters and Devised to them 180£ a piece but if any of them die without Child her part to go to the Survivors One of the Daughters married Broadhurst and before the Portion [135] paid died without Issue B. exhibits his Bill against the Ex'r and had a Decree for the 180T for a Sum of Money can't be Intailed Yet this Rem'r was upon her dying without Child which was a Contingency to happen within the Compass of one Life and so is Boucher and Antram Pollex 37. 2. Cha. Rep. 6

Cases against me are Vachel and Varhel 1. Cha. Cas. 129. Taufield Vachel Devised the use of several Paintings and Rarities to his Wife for Life and after her Decease to her Son if she shou'd have one, But if she was not with Child or that Son died without Issue Male, then they were to remain to the use of Thomas Vachel the Plt. and that they shou'd remain as an heir Loom and go and remain to such Persons as should Inherit his Mannor &c. in Berks And it was Decreed with the Advice of the Judges, That as Thomas Vachel the Plts. Father died in the Lifetime of Taufield and the Deft. Roberta being not with Child so that the Contingencies upon which the Limitation was made never happening, the Lord Chancellor with the Judges were all clearly of Opinion that the Devise to T.V. the Son was Absolute and good in Law

But here nothing was vested in the Father or anybody else Clent and Bridges Lord Not. Rep. 26. Bridges by his Will gave his two youngest Daughters 600£ a piece to be paid within 3 Months But if either of them die before 21. he desired and so far as in Law and him lay did give the Portion of her so dying to be equally divided between the Survivor and the Plt. The Daughters received their Portions and one of them died before 21. And the Lord Shaftsbury Decreed for the Plts. But upon a rehearing by Lord Nottingham that Decree was reversed because the 600£ was Absolutely vested in the Daughters and that it cou'd not be Subject to the Contingent Clause For where a certain determinate time is appointed for the payment of a

Legacy and afterwards a Contingent Clause is added the Contingency is vain and Idle unless it happen within that Period of time appointed for the payment of the Legacy and it may be say'd here the Contingency happened within the time when David Fox was to have the Possession of this Estate

And there are several Cases when a Legacy is given to one and upon a Contingency which may happen in a few years Rem'r to another that such Rem'r is good

Pawlet and Doggat 2. Vern. 86. 2. Vent. 347. Martin & Long 2. Vern. 151. Where a Rem'r of a Chattle upon the Contingency of dying without Issue before 21. was held good And in the Case of Pinbury & Elkin 2. Vern. 758. 766. a Rem'r of a Chattle If one dyed without Issue living at her death was Decreed to be good But the difference betwixt these Cases and our Case is that here the Limitation in Rem'r of the Personal Estate [136] is to David Fox and the Heirs of his Body which is an Estate Tail and no Remainder of Goods after an Estate tail is good

So is the Lady Bergavernny's Case 2. Vern 324.

As to the other point That David Fox died in the Lifetime of the Wife whereby it is say'd the Gift to him is void Tho' by the Civil Law it is a Rule laid down by Swinburne That where a Legacy is payable at a time uncertain as at the death of the Testors. Wife, or the like, if the Legatee be then dead it is not to be Transmitted to the Ex'or but is a Lapsed Legacy Yet it is otherwise in Equity and so Decreed in the Lord Clarendons Case 1. Vern. 35. & Vern. 758. 767. And if the Plts. have any right they may Compell the Deft. to give Security. 1. Cha. Rep. 110. 1. Cho. 121.

Mrs. Chichester dying this matter was not Argued

But afterwards the Suit was revived by George Heal in behalf of all his Daughters. Several of which were born after the death of the Testor. And upon a Demurrer for several Causes that the Plt. had no Equity, had not made proper Parties And that the after born Daughters had no Title. The Case was argued

And the Court Decreed for my Client which is a good Decree upon the difference before mentioned The Rem'r being to David Fox, and the Heirs of his Body, but if those words had been omitted the Limitat. over would have been good *Vid.* Fitzgibbons 315. S. P.

April 1730.

CHURCHILL vs BLACKBURN. *Qui — tam Appeal from Middlesex County Court.*

Whether foregoing special Words shall restrain subsequent general words.

Anno. 1772. an Act of Assembly passed restraining the Inhabit'nts of Virginia from planting for every Labourer above 16 years old more than 6000 Tob'o plants, and for every Male Labourer above ten and under 16. more than 3000. the Act Appoints tellers of all Tobacco planted and the Method of telling, and gives them a Power to cut up the overplus and Annexes several Penalties

It directs that all Masters of Family's and Housekeepers shall deliver to the Justice appointed to take the list of Tithables a true account of the Names of every Person above ten and under 16. allowed by this Act to make Tobacco And distinguish in their Lists of Tithables what Persons make Tobacco Then Enacts, That every Master of a Family and Housekeeper failing so to do shall forfeit and pay 500wt of Tobacco [137] and if any Person shall List or enter with the Justice any Person under 16. years as a Tithable or that is under 10 years or above that age or any Person as a Labourer in his Crop who is not employed therein. In either Case the Person so offending shall forfeit and pay 500wt of Tobacco for every such Person so falsly entered or Listed

Then comes a Clause in these words " And if any Master, " Mistress or Overseer shall refuse to give a just and true Account of the Names of the several Persons by this Act Intitled " to plant Tob'o on their Plantations and to shew all the Tobacco " planted thereon to the Persons appointed to view the same, " every Master, Mistress or Overseer, so refusing or giving a " false account shall forfeit and pay 500wt of Tobacco for every " Person above 10 years old employed in making Tobacco on " such Plantation that year

Thomas Machen a teller under this Act Exhibits an Information against Mr. Churchill for 500wt of Tobacco forfeited by the first Branch of the Act for Listing Doll as a Tithable when she was under 16. And upon that Information has obtained a Verd't and Judgm't in the County Court

Blackburn the Plt. Exhibits another Information upon the last Clause for 24000wt of Tob'o being 500wt of Tob'o for every Person above 10 years upon the Defend'ts Plantation in that year for Listing the same Negr. Doll as a Tithable when she was under 16. and upon that Information has obtained a Verd't and Judgment in the County Court for 6500wt Tobacco

This Judgment Mr. Churchill has appealed from and surely it shall be reversed

The only Question is Whether the Deft. shall be Subject to the Penalty of 500wts of Tobacco upon the Information of Machen and to this much greater Penalty of 500wts of Tobacco for 48 Persons above 10 years old Employed that year upon his Plantation upon the Information of the Plt. for the same offence viz. Listing Negro Doll as a Tithable

If this Clause upon which the Plts. Information is grounded had stood single and were construed Literally, as it must, being a Penal Law it might be a Question whether this Case wou'd be within it, For tho' it may be Argued, that the words (or giving a false Account) may extend to a false Account of the age, Yet being restrained to the first part of the Clause it can be strictly Construed only a false Account of the Names and not of the Ages

But as our Case is the point need not be Laboured, because the Offence the Deft. is charged with, Listing a Person as a Tithable who was under 16 is specially mentioned in the same Clause and a small Penalty is annex'd to it which without doubt the Legislature thought adequate

So that if one part of the Act be Expounded by the other there will remain no pretence of Argument that the Deft. shall first be charged with [138] a small Penalty by the special Clause, and then with this very great Penalty by the general one

The plain meaning of the two Clauses taken together is this, If a Master List any Person a Tithable that is under 16. or one above 10, that is not so, or a Labourer in the Crop who is not Employed in it he forfeits 500wt. of Tob'o

And if he gives an Account of Persons as employed upon his Plantation in making Tob'o that are not employed at all upon that Plantation or perhaps are not in being, then he is Subjected to the great Penalty of 500wt of Tobacco for every Person above 10 years old Employed in making Tob'o that year upon such Plantation

And there is great reason that the Penalty shou'd be greater in one Case than the other, For mistaking the age of a Person may proceed from a defect in the Memory or misinformation as it happened in this Case And listing one Actually employed about the Business of a Plantation as a Labourer in Tobacco who is not really so is a less degree of Deceit than giving in the Names of Persons he is not Master of

But it will not concern us to shew what is the meaning of this latter Clause, We shall shew from the established Rules of Law that the Deft. cannot by Construction be punished twice for the same Offence under this Act

1st. It is a Rule that one part of an Act of Parliament shall be Expounded by another and in many Cases General words shall be Restrained by the Equity of other words and shall be construed against the Letter, As in Flowers Case 5. Rep. 99. Upon the Stat. 5. Eliz. Chap. 9. ag't Perjury, one part of the Act provides against such as Suborn Witnesses in any matter depending by Bill, Writ, Action, or Information Then there is a Clause ag't such as Commit Perjury by such procurement

Flower was Indicted for Perjury in giving false Evidence to the Grand Jury upon an Indictment Adjudged that tho' this last Clause be general and not restrained by any words to the particular Suit before mentioned By Bill, Writ, Action or Information Yet in good Construction this Branch shall have reference to the first and shall be Expounded by it And so one part of the Act shall expound the other And Flower was Discharged, because Perjury by Indictment is out of the Act, *vid.* Co. Lit. 381.

2dly. It is a Rule that no Man shall be punished twice for the same Offence and no Construction of an Act of Parliament can be made ag't that rule Therefore it is the penning of all Statutes where two Penalties [139] are Annexed to be over and above the former Penalty And this is only done in Cases of repeated Commission of the Fact, Or where the Offence Admits of greater or less Degrees But lastly it is a rule that a general Clause shall not extend to things that are before Specially Comprehended And this rule takes place in Deeds as well as Acts of Parliament.

If a Man by Deed gives Land & the Premises to one and the Heirs of his Body Habendum to him and his Heirs, he has an Estate Tail and fee Simple expectant upon the Reason of this rule 8 Co. 154. and Vide Litt. Rep. 345.

In the Case of Edw'd Ettham 8. Co. 154. C. This Rule of Construction laid down, where a Deed speaks by general words and afterwards Descends to special words If the special words agree with the general Words the Deed shall be intended According to the Special words.

But a general Clause never extends to what is specially Comprehended before *vid.* also 2. Rol. Rep. 279. Styles 391. That the same Rule is Observed in Construing Acts of Parliaments appears in Raymond 330. Hard. 108. But a Case full to the point is that of Dr. Bonham 8. Rep. 118. b.

Hen. 8. by Charter Enacts the College of Physicians in London and Grants that no Person shall Practice in London or the Suburbs or within 7 miles without License of the College upon the Penalty of 5*£* [ineligible] half to the King, half to the College.

Then the Charter Grants Supvisn Examinations, Corrections & Gubernations of all Physicians and the Punishing them for the Offences and *non bone exequendo* &c. so as the Punishment be by Fine & Imprisonment.

In 14. H. 8. this Charter was confirmed by Act of Parliament. Doctor Bonham Practiced Physick without License of the College. The College Summoned him, and Adjudged that he shou'd pay the Penalty.

The Doctor continued to Practice, the College Summoned him again but he made default, and for his disobedience and Contempt they amerced him 10*£*. and that he shou'd be Committed, Afterwards he came before them, they asked him if he wou'd satisfy the College, he Answered that he had Practiced and wou'd Practice. For which Cause he was comitted to Prison and for this Imprisonm't he brought his Action & recovered.

And among other points it was resolved That by the latter Clause of the Charter (which operated as an Act of Parliament by 14th of H. 8.) the Doctor shou'd not be punished by Imprisonm't [illegible] several Reasons, two of which are That no Man should be twice punished for the same Offence [140] And that a general Clause shall not extend to what is specially provided, which is exactly this Case. The Offence for which the County Court have given Judgment against the Deft. is specially provided for in the former Clause. That Clause subjects the Deft. to the Penalty of 500wt of Tobacco, the Court below have given Judgm't for 6500wt of Tobacco.

This Judgment is absurd and against Common Sense, and

can't possibly be affirmed in this Court, and I pray that it may be reversed And it was reversed by the whole Court except one.

CHURCHILL *ads* MACHEN Appeal from Middlesex Court.

Whether an Indictment finding a fact being &c. is good.

The Deft. has likewise Appealed from Judgment given upon the Information of Machen upon the Act of Assembly ment'd in the Case above.

The Information Charges That the Deft. being Master of a Family and a House-keeper, When he gave in his List of Tithables *Anno* 1725 did List with Roger Iones the Justice appointed to take the List of Tithables in that year one Female Negro called Doll, being under the age of 16 years as a Tithable ag't the Form of a certain Act of General Assembly Summoned to be held at W'msburgh the 5th of December in the ninth year of the late King *Anno que Dom.* 1722. and by Writ of Prorogation begun and held on the 9th of May 1723.

Upon the first reading of this Information I thought it liable to Exception 1. Because there was no sufficient Description of the Deft. to bring him within the Purview of the Act, being say'd that he being a House-keeper. 2dly. It is not observed that the Negro Doll was under 16 years of Age, But only, being under 16 years of Age But upon a more deliberate Consideration of the Case I was satisfied that the information was well enough from the follow'g Cases 2. Mod. 128. Mo. 606. Cro. Ja. 610. 2. Leod. 5. 2. Rolls. Reps. 226. Raym'd 378. Yet being well satisfied that the Jury were very Partial in finding the verdict without clear Evidence to Convict the Deft [2 lines illegible.] [141] Where Smith a Commissary of the Bishop of Hereford was Indicted for Extortion in taking 8d. for Committing *Admon contra form'a Statu'e.* The Indictm't was That Smith *existens servus sive deputatus* took &c. which being uncertain it was quashed.

But the Judgm't was Affirmed.

THORNTON *vs* BUCKNER. *In Chanc. Fr Plt.*

Some distinctions as to Joint enants &c. A will of lands good before patent obtained.

Thomas Pannel and John Prosser Surveyed 2200 Acres of Land upon the Branches of Mattapony and made a Division

thereof, but never took out any Patent for the same But afterwards they made another Survey of 2500 Acres of which the 2200 Acres were parcel and for this 2500 Acres obtained a Patent granted to them by Sr. William Berkeley the 4th of November 1673. Before the passing of this Patent, the 28 Aug't 1673. John Prosser made his Will and thereby Devised his part of 2200 Acres first Surveyed in these words

"Item I give to my Sons jointly by name Roger and Anthony Prosser a Dividend of Land Containing one thousand and one hundred Acres lying upon Mattap'y Swamps to them and their Heirs for ever to be divided by Lot, when the eldest of them comes to age, and dying without Issue to be equally divided between the Surviving Brethren, yet this shall be no bar to hinder any of them selling his own porper Inheritance." And he gave his Lands, not disposed of to his four Sons, and after passing the Patent John Prosser died leaving Issue four Sons, John his eldest Son & Heir Roger, Samuel and Anthony. "Item I give to Anthony Prosser a Tract of Land lying at Mattapony Branches which was taken up between his Father John Prosser and myself Copartnership, the s'd Land I say to be divided between my own Children and him and their Heirs for ever"

Thomas Pannel after making this Will died leaving Issue a Son and two Daughters, William, Mary and Isabella and his Wife enseint of a Son, who was born and Named Thomas

Mary married one Francis Stone & Isabella married Rich'd Philips who died after her Father and left one Child a Daughter named Catherine who married one John Knight, After the death of Thos. Pannel and Isabella a moiety of the Land was divided into 5 parts whereof 2-5 were assigned to William the eldest Son 1-5 to Thomas the after born Child 1-5 to Mary Stone and the other 5th to Catherine the Daughter of Isabella

Anthony Prosser died in the life time of Roger leaving Issue Anthony his Son and Heir John Prosser the eldest Son of the Patentee died leaving [142] Issue Samuel Prosser his Son and Heir. This Samuel & Anthony 21. Jan'y 1717. sold and Conveyed their Estate in these Lands to Francis and Anthony Thornton the Plts. who have ever since been in Possession thereof

John Knight and Catherine his Wife 24th March 1715 sold and Conveyed their part to them. So we say the Plts. are intitled to a moiety of the 2500 Acres and to 1-4 of the other moiety

John Buckner purchased William Pannels part *Anno*. 1707 and Devised it to Thomas Buckner one of the Defend'ts.

Richard Buckner the other Deft. *Anno* 1707. purchased Thomas Pannels part In the same year he purchased Mary Stones part by the Name of 844 Acres and 220 Acres

And Roger Prosser by Indentures of Lease and Release dated the 9th and 10th Days of January 1709 Conveyed to the same Richard Buckner and Larkin Chew his part of the Lands being by Estimation 550 Acres more or less

Roger Prosser and Samuel the Sons of the Patentee are dead without Issue

The Plts. Francis and Anthony Exhibit their Bill ag't Richard Buckner and Thomas Buckner to have their parts ascertained and to have Partition, they have Demurred to the Bill

But at the last Court the Demurrer was overruled and the Court Ordered the Plts. Title to be tried at Law and now the Case as it is above Stated is agreed between the Parties And the Question will be what part of the 2500 Acres Granted to Prosser and Pannel, the Plts. are intitled to or whether they have any Title, or any part, and in the determining this Question, two points must be considered

1. If the whole Patent accrued to Thomas Pannel upon the death of Prosser by Survivorship what portion of the Land Anthony Prosser and the Children of Pannel were respectively Intitled to under Pannels Will. Whether Anthony Prosser shall have a Moiety and the four Children of Pannel the other moiety as Tenants in Common, or Whether Each of them shall have 1-5. 2. If nothing Accrued to Pannel by Survivorship Whether Roger and Anthony Prosser did take anything in the 1100 Acres by their Fathers Will which was made before the Patent passed. For if they cou'd take, the 4 Sons by the last General Clause might take the Residue.

As to the Survivorship I need say nothing to it, either one way or the other the Plts. have a Title to a moiety and 1-4 of the other moiety. But I take it there shall be no Survivorship in this Case in Equity.

[143] 1. If there was a Survivorship in the Case Anthony Prosser must have a Moiety as Ten'ts in Common and the four Children of Pannel were Tenants in Common of the other moiety.

For the Testor. declaring that the Land was taken up in Partnership between him and Prosser, his Intent clearly was

that the Land shou'd go according to the Agreement, and that it shou'd be divided between Anthony and his Children in Moietys. Otherwise it must be Supposed that he did not intend to do Justice which cannot be in the Case of a Will

Then for the other moiety the 4 Children must be Tenants in Common by force of the words [Equally to be divided] which shall run to both moietys and so is the Case in 3. Mod. 209. Where a man Devised his Lands to his 3 Grand Children to have one moiety and the Daughter the other And the Court were all of Opinion that the Grand Children were Ten'ts in Common of their moiety

Then the Plts. will be intituled to one moiety and 1-4 of the moiety which was Isabellas part

2dly. If there be no Survivorship, Prossers Moiety is not disposed of His Will as to the 1100 Acres is void being made before he had a Title. The Statute of Wills is, That any Persons having Lands may by his Will dispose of them. This word, having imports two Things, to wit, Ownership and the time of Ownership, For to be able to Devise Lands a Man must have them at the time of making his Will 3. Co. 30. b. Butler and Bakers Case

If a Man by his Will devises all his Lands and afterwards Purchases other Lands the new purchased Lands shall not pass, for a Man can't give that which he has not, and which was void in its original can never be good. If an Infant makes a Will it's void, tho' he come of full age before he die. So of a feme Covert, And in these Cases there is only a Personal disability viz. Ifancy Coverture, Here is a real disability, wanting the Thing, And the Constant form of Pleading is That the Testor was seized and being so seized made his Will Bunter *vs* Coke Salk. 237.

Then prossers moiety descended to his Heir at Law of whom the Plts. have purchased But perhaps the Case in Fitzgib. Devise 17 and Bro. Devise. 15. and Plowd. 344a. If a Man devise Lands Certain, as the Mannor of D. and Whiteacre and has nothing at the time of making the Will and after he purchases it, it shall pass by the Devise, because it shall be supposed that he intended to Purchase it And the Rule of Equity 1. Cha. Ca. 39. That if upon Articles for a Purchase the Purchasor dieth and Deviseth the Land before the Conveyance Executed, the Land passeth in Equity, And that [144] a Pur-

chase without a Conveyance is an Equitable Interest and is as well Deviseable as a Real Estate, the Vendor being Trustee for the Purchasor 2. Vern. 680. 1. Cha. Ca. *ubi Sup.* may be objected

If it be so the Defts. can have no more of Prossers moiety than Roger Prosser sold which was the half of 1100 Acres to him Anthony and the rest descend'd to Anthony the Heir at Law to the other Devisee

So upon the whole matter the Plts. are well intitl'd to one Moiety and 1-4 of the other moiety If Tho's Pannel took the whole Patent by Survivorship. If he did not nothing passed by Prossers Will but his moiety Descended to his Heir at Law of whom the Plts. have purchased. If any thing did pass Roger Posser sold 550 Acres, not claiming Anthonys part by Survivorship. Besides Roger and Anthony were Tenants in Common by the words of their Fathers Will. His directing that the Land shou'd be divided when the Eldest came of age and declaring if they die without Issue it shou'd be equally divided between the Surviving Brethren plainly shew his meaning that he cou'd not intend the Issue of either of the Sons shou'd be deprived of their Inheritance by Survivorship which is never favoured in Equity

The Court upon the Argument of this Case was of Opinion That the 1100 Acres passed by Prossers Will to Roger & Anthony as a Tenancy in Common.

That by the Will of Thos. Pannel Anth'o. Prosser was Intitl'd to so much as wou'd make up that 1100 Acres a moiety of the whole which the Plt. had purchased. And that the Plts. were intitl'd to one fourth of the other moiety Isabella's part

But the Lawyers on both sides the next morning met in the Secretarys Office to direct the Clerk in drawing the Decree, And I had Directed the drawing the Decree According to the Opinion above ment'd But the Lawyers for the Defts. telling the Clerk the moiety of the 1100 Acres was to be divided by Pannel's Will between his Children And that the Plts. were Intitl'd to the other Moiety under Anth'o Prosser and that the Deft. R. B. to one half of the 1100 Acres and the Plts. the other half

So the Decree was drawn and being for my Clients Advantage I did not gainsay it.

[145]

April 1730

¹MARSTON vs PARRISH. Detinue Fr Deft.

John Williams was possessed of two Negro Boys Arther and Bill and two Negro Women Dinah and Nanny and made his last Will 22d. April 1713. Willed his Negroes and all other Goods and Chattels to be valued and Appraised and equally divided between his Wife and 3 Children, and that his Wife shou'd keep his Childrens Estates till they came of age and died soon after making his Will, After his death the Negro Woman Nanny had two Children, Obey and James, and the Negro Woman Dinah had a Child named Essex

Anthany the Widow married John Marston who supposing his Wife to be with Child, by his Will dated the first day of December 1719 Devised these Negroes viz. Arther, Will, Nancey, Essex, Obey and James to the Child his Wife was enseint of, and gave all the residue of his Estate Real and Personal to his Wife and her Heirs for ever, paying his Debts and the Orphans Estates in his Hands and died soon afterwards, but his Wife did not prove with Child and the Widow is married to her 3d. Husband Parrish the Deft. and none of Williams Children are of age

And the Plt. as Heir at Law to Marston the 2d. Husband hath brought an Action of Detinue for Arthur, Will, Essex, Obey and James which are properly William's Estate and for Nancey which was Marstons proper Estate

The Plt. as to the Negroes that were William's cannot maintain an Action of Detinue. For by the Will of Wm's they were to be equally divided between his Wife and Children, and until her part is ascertained by a Partition it is uncertain which of them is hers

Therefore supposing her part vested in Marston her Second Husband, And that it descended to the Plt. as Heir at Law, the Plt. must know which of the Negroes are his to support this Action For in Detinue the Things demanded must be certain as in Debt

But there is a stronger Objection, and that is to the Plts. Right to the Thing demanded upon the Will of his Brother

¹S. C. in MSS. Virg. Rep. in Congr. Library. and printed in Jeff. Rep. [Note by W. G.]

The Devise to the Child in *ventre Sa mere* never vested because no child was born, but was for that reason void And what ever was intended to have been given to this Child if it had been born, by Law vested in the Wife to whom the residue of the Estate was given

A residuary Legatee is in Law Haredis and universal Successor to the Testator, and must have every Thing that is not given away by the Will. Here was only an Intention to give, but no Gift for want of a Person to take

Tho' in the Case of Sprigy and Sprigy. 2. Vern 394 it was [146] Admitted that in the Devise of the residue of a Personal Estate if a Legatee was dead at the time of making the Will the residuary Legatee shall not have the Benefit of that Legacy and that it shou'd not fall into the residue, because nothing was intended to pass by that Devise but the residue, after that and other Legacies paid.

Yet the principal Case there was of a Legacy to Thos. Sprigy if he came from beyond Sea. And the Lord keeper was of Opinion that the Devise being Contingent, and Conditioned preced't which never happened was as if never given and the residuary Legatees shou'd have the benefit of that Legacy

So here in a Case of a Devise in *ventre sa mere* is a Contingent Devise, for in reality the Woman was not with Child, and the Intent of the Testor appears plainly to be that the Wife shou'd have all his Estate if there was no Child, taking Notice of no body but his Wife and the Child he supposed she went with And there is a great deal of reason and Iustice she shou'd have it, for all the Negroes except one came by her, And she is Chargeable with all his Debts and the Estates of Orphans out of the residuary Estate

The Court were of Opinion that the Plt. had no Right to recover the five Negroes that were Williams's, And, that the Plt. shou'd recover the Negro that was Marstons as his Heir at Law

¹EDMONDS *vs* HUGHS. *Det. Fr Deft.*

Remainder of a chattel after Estate for life good in a Will.

The Special Verdict in this Case is very imperfect and Incertain so that no Title in the Plt. can be Collected from it, But the Case is thus, Richard Alderson was possessed of several

S. C. in MSS.Virg. Rep. in Congr. Lbry. and printed in Jeff. [Note by W. G.]

Negroes in the Decl. mentioned and made his last Will and Testam't in these words (dated 16th Sep'r 1695) " My Will is " that Margaret my Wife shall be Sole possessor and disposer " of all and every part of what Estate it hath pleased Almighty " God to endue me withal, during her Life, providing she keep " herself unmarried, or in Case she do marry again, that she " nor her Husband, or any Person or Persons in their behalf " by any means or Instrum'ts to Imbezel or make waste of the " s'd Estate to any Indemnity to my Children." Then by another Clause he gives his whole Estate Chatel and Chatels to his Son Richard, please God he lives &c.

[147] Margaret after her Husbands death married the Plt. who left her and carried off several of the Slaves and as it is say'd married one of them and has several Children by her.

Margaret died and Richard Alderson the Son took the Negro's in the Decl. mentioned and sold them to the Defend't.

And the Question will be Whether the Rem'r of Negroes which are at the time of the Testors death Chattels (first given to Margaret for Life be a good Rem'r to Richard

And I think clearly it is

The Devise that his Wife should be sole possessor of his Estate during her Life, if it had gone no farther it wou'd have been construed as to Chattels no more than the Devise of y'e use and in that Case without doubt a Remainder might by the Rules of Law be Littited over But when he goes on and says she shall be sole possessor and disposer of every part of his Estate during her Life it may be a question whether it be not the same as if he had given his Estate to his Wife for Life Rem'r over

And admit it to be so yet the Rem'r will be good, and Richard had a good right to the Negroes after his Mothers death. There is a difference taken in the old Books, where the thing it self is Devised, a Devise over is void But where only the use is Devised to one for a cert'n time it is otherwise And the principal Case to this purpose is 37. H. 6. 36. Bro. Abr. Title Devise pl. 13. upon which several other Resolutions have been built viz. Plowd. 521. b. Owen. 33. Marsh. Rep. 106.

But these Authorities are certainly too rigid in the Case of a Will where a Construction ought to be made as far as the Law will admit that the Intention of the Testor, may take place, for a Man upon his death Bed being supposed to be *inops consilii*,

the Judges will so Expound his Words that the whole Will may stand and take effect

And as to the Case here of latter times it has often been resolved upon great debate contrary to the old Books and at this Day the Law is not so Strict as it was formerly taken to be in the Disposition of Personal Chattels. For instance In the Case of Catchmay and Nicholas A'o 1673. where one Devised all his Estate to his Sister during her Life and after her decease he gave 400£ a piece to his four Neices which Estate Consisted of Personal Things, there it was insisted that the Legacy to the Neices was void, it being the Devise of the Rem'r of a Personal Thing after the death of another to whom it had been already given

The Master of the Rolls referred this point to Justice Ellis [148] for his Opinion, which was that the Remainder was good, and it was so Decreed at the Rolls, And upon an Appeal to the Lord Keeper the Decree was affirmed, Lord Nottinghams Rep'ts 116. for the first Devise shou'd be construed a Trust

Sr. Tho's Charges Case A'o 1691. Nelsons the old Duke of Albemarle Devised his Jewels and Plate to his Wife for Life and afterwards to his Son Christopher which was a plain Devise of a Chattle personal with a Remainder, And the Master of the Rolls held this should be Construed a Devise of the use of the Jewels in Order to Support the Will and Intention of the Testator

S. C. is reported 2. Vern. 245. And the Lord Chancellor Decreed Accordingly, And the Remainder to the young Duke was held good.

In the Case of Hide and Perrot 2. Vern. 331. The Plts. father Devised to his Wife all his Household Goods in his dwelling house at Heddesden during her natural Life, and after her decease to his Son Joseph And the Question was Whether the Devise over of these personal Chattels was good or not.

The Lordkeeper held that the Devise over was good, for as to the Personal Chattels the Civil and Common Law is considered, and there the Rule is, Where personal Chattels are Devised for a Limited time it shall be Intended, the use of them only, and not the Devise of the Thing itself, And therefore allowed the Rem'r over to be good.

These Cases were determined upon Solemn Arguments and are conformable to the Resolutions in several other Cases cited in the Reports They come up expressly to the Case at Bar, and

there can be no Question but According to them Richard had a good right to the Negroes now in Question.

And it was Adjudget for the Deft.

¹TUCKER *vs* SWENEY. *Appeal from Eliz'a City. Fr Appell't.*

Increase of Slaves after the death of owner, may be taken in Ex'on for his debt.

The Case.

Mr. Dandridge recovered Judgm't against the Ex'rs of Nicholas Curle for 507£. Curle died possessed of several Slaves and of these Slaves after his death there was a Considerable Increase Mr. Dandridge took out a *Fi. Fa.* which was served upon several of the Slaves which Curle died possessed of and likewise upon several of the Negroes born after his death And the Question is Whether the Increase of the Negroes may be taken to satisfy this Judgment. And I hold clearly they may.

Negroes notwithstanding the Act making them Real Estate remain in the Hands of the Ex'ors by that Act as Chatels and as such do vest in them for payment of Debts So that in this Case they are considered [149] no otherwise than Horses or Cattle, And there is no doubt but the Increase of any living Creature after the death of the Testor, are looked upon as part of his Estate, and are liable to be taken for his Debts.

The authority for this is Went. 83. And was Adjudget by the Court.

LEGAN & VANSE *vs* LATANY. *Ejectm't. Fr Deft.*

A case where a devise to one, & if she die with't issue to ans'r — & the first devisee had a fee-simple.

The Case agreed is thus.

John Penn was seized in fee of the Lands in Question and by his last Will and Testament devised them to Ann Sharp in these words I give and bequeath unto Ann Sharp Daughter of John Sharp my Plantation which I now live on, Then in another Clause at the end of his Will he says " And for my Land which " I have given unto Ann Sharp if it shou'd please God that she " die without Issue I give to my friend Thomas Harwar, Other- " wise to her and her Heirs for ever

¹S. C. in M.S.S. Virg. Rep. in Congr. Library. and printed in Jeff. Rep. [Note by W. G.]

Ann Sharp married Vincent Vanse and had Issue by him John Vanse her Son and Heir, who is the Lessor of the Plt. but Vanse & his Wife by Deed dated the 20th of February 1692. Acknowledged by them both in Court she being first privately Exam'd. Conveyed the Lands in Question to Edward Thomas in fee And Edward Thomas by his Will dated the 28 of May 1699. Devised the Lands to the Parish of South Farnham for a Glebe And the Minister of that Parish hath ever since enjoyed it as such And Latany is now Parson of the Parish

The Question arising upon this Case is What Estate Ann Sharp had by the Will of Penn: Whether an Estate in fee or an Estate Tail And I must think she had an Estate in fee

I admit if Lands be given to one and if he die without issue General. The word Issue makes an Estate Tail by Implication, but when the dying without Issue is Limited within a certain time it is Otherwise So it is held in the Case of Bacon and Hill Moor 464. Cro. Eliz. 498. So Adjudged in the noted Case of Pell & Brown where one Brown leaving 3 Sons Tho's W'm and Richard by his last Will Devised Lands to Tho's for ever and if Tho's died with't Issue living W'm that then W'm shou'd have the Land, And it was resolved by all the Justices that Tho's had a fee, because the first part of the Devise carry's a fee And the Clause If he died without Issue is not Absolute and Indefinite, whensoever he died without Issue, but with a Contingency if he die without Issue living W'm Cro. Ja. 591.

[150] My Lord Chancellor Nottingham in the Duke of Norfolks Case 31. and 49. Says there is not a clearer Rule in Law than this, that there can be no Remainder Limited after a Fee Simple, but yet the nature of Things and the necessity of Commerce between Man & Man have found a way to pass by that Rule and that is thus

Either by way of use, or by way of Devise Therefore if a Devise be to a Man and his Heirs and if he die without Issue in the Lifetime of B. then to B. and his Heirs, this is a fee Simple upon a fee Simple and yet it has been held good, and he mentions the Case of Pell and Brown and says the Law was so Settled before in a Case between Hynde and Lyon 3. Leond. 64.

The Law being clearly settled in this point it only remains to shew that the intent of the Testor. was not that the Land shou'd remain to Harwar, if Ann Sharp at her death left Issue and that Issue after several Years shou'd fail and be Extinct

But that he intended to Limit her dying without Issue to a certain time, And that I think is clear enough from the whole Will, Otherwise the last words must be rejected as Senseless, which cannot be in the Construction of a Will where the Judges will make use of every Word of the Testors, [if it be possible] and make such an Exposition as that the whole Will may take effect and nothing be rejected.

If the Testor. intended that Harwar shou'd have the Land whenever the Issue of Ann Sharp shou'd fail the Subsequent words (Otherwise to her and her Heirs forever) are useless and must be Rejected as having no meaning.

For the first words (if she die with't Issue) had fully Expressed that before But the word (otherwise) does plainly shew the Testators Intent to be thus If Ann Sharp shou'd have no Issue living at her death I give the Land to Harwar, otherwise, that is, if she leaves Issue, I give it to her and her Heirs forever, And if this be his Intent Ann Sharp had a fee Simple. In Common parlance or According to Vulgar Acceptation A Man is say'd to be dead without Issue when he has no Issue living at the time of his death 2. Vern. 759. 767.

Indeed in the Legal acceptance it is understood of a future time when the Issue left at his death might afterwards happen perhaps 100 years after to die without Issue. But where there are other words to shew the Testors. Intent to be According to the Vulgar Acceptation [151] they shall be taken in that Sense As in the Case of Pinbury and Elkin 2. Vern. *ubi. Supra.* Where a Man by his Will gave Money & other Personal things to his Wife provided if she died without Issue that the 80 £ shou'd remain to his Brother after her decease, And the Lord Chancellor was of Opinion that the words (after her decease) shewed the Testors. Intent to be that his Brother shou'd have the 80 £ if his Wife had no Issue at her death and so Decreed the Devise over to the Brother to be good There is another reason for Construing the Words (if she die with't Issue) to be Limited to the time of her death from the Estate given to Harwar which is no more than an Estate for Life.

For if the Testor. meant that Harwar shou'd have an Estate for Life whenever the Issue of Ann Sharp shou'd fail which perhaps may not happen these 100 years, Then the Devise to Harwar in all probability is vain and fruitless, for an Estate for Life after failure of Issue in another must be looked upon as nothing.

But admit that the words (if she die without Issue) shall be Construed generally yet taking both parts of the Clause together Ann must have a Fee.

For then the Testors meaning must be taken to be thus That Ann shou'd have a Fee simple determinable upon failure of Issue in her. And it is the same thing as if he had say'd I give my Land to Ann Sharp and her Heirs so long as she has Issue, this is a Fee Simple determinable upon the Contingency of her dying with't Issue. If Land be given to one and his Heirs so long as I. S. has Heirs of his Body, or so long as he shall pay so much money, Or so long as the Church of Saint Paul shall continue These are Fee Simples determinable. so is Plowd. 557. 10 Co. 976. Seymors Case.

Indeed my Lord Coke says a Rem'r cannot be Limited upon a fee Sim. But the Lord Chief Justice Vaughan in the Case of Gardener & Sheldon 269. Questions that Opinion as grounded upon no Authority.

So upon the whole matter, taking the words of the will either one way or the other Ann had a fee Simple and under her there is a good Title derived to the Defend't And I pray Judgm't for him.

And it was Adjudged for the Deft. that it was an Estate in fee in Ann Sharp.

[152]

October 1736

[Note the date 1736.—W. W. S.]

¹ROSS EXTOR BAG *vs* COOKE & al. *Post.* 248 S. C.

The Defend'ts having Pleaded that they were under age and prayed that the Parol might Demur Upon Demurrer Judgm't was given *quod Respondeant Ouster*. After which they pleaded in Abatem't of the Writ, to w'ch the Plt. replied an Imparl. the former Plea & Judgm't. And thereupon Demurrer & it was Argued for the Plt.

That this Plea being in Abatem't cou'd not be Pleaded after imparl. which was a known & Settled point. 1 Vent. 76. 137. Sty. 187. 2. Lutu. 22. 24. 8. Mod 43. 381. It is true matter of Abatem't may be Pleaded after a Spl. Imparl. & it is also true that the Deft. here in the Office had a Spl. Imparl. granted,

¹S. C. in W. G.'s Barradall 160. [Note by W. G.]

but the Plea, is pleaded with't any Notice of it and therefore they have waved & lost the benefit of it

The nature of an Imparl is nothing else but the Continuance of the Cause to a further Day for the Deft. to advise what to Plead Terms of the Law 289. and when the Deft. has any thing to Plead in Abatement with a *Pulvis sibi omnibus advantagijo* &c. and this is called a Spl. Imparl. after which matter of Abatem't may be pleaded as I say'd

In England these spl. Imparlanes are granted by the Secundarys in B. R. and the Prothonotaries in C. B. as they are by the Clerk here out of Court and there are various sorts of them, as with a saving Exception to the Writ, to the Writ & Decl., or with a saving of all Exceptions whatsoever Hard. 365. 1. Salk. 1. and when the Deft. comes to plead he shews the nature of his Spl. Imparl. in his Plea, and this of necessity for two Reasons 1. That the Court may judge whether the matter he pleads is proper after such Imparl. because if it be not the Plea will be judged nought, for Instance If the Imparl. be only with a saving to the Writ or Bill he shall not plead to the jurisdiction or any matters in Abatem't of the Count or Decl. 1. Sal. 1. 1. Hard 365. 2. That the Imparl. may be made a part of the Record & so are all the preced'ts that I have seen of Spl. Imparl. 1. Lutu. 6. 44. the Clerk in making up this Record can take no notice of this Imparl. not being in the Plea. So if the Record was made up here as it is in England before tryal it cou'd not appear there had been such Imparl. Nor will it appear to Posterity And then if Judgm't is given upon this Record for the Deft. it will not appear but that this Courts opinion was that matter of Abatem't may be Pleased after a Gen'l Imparl. which I presume it is not. From hence I argue the necessity of shewing the Imparl. in the Plea & that where the Deft. does not do it, tis in effect a waver of it at least this Plea is defective in form the Preced'ts being all ag't it And in Pleas of Abatem't which are generally for delay the greatest strictness & nicety of pleading is required, the Reason is because they are not to be Encouraged or favoured. But if this Objection will not hold this Plea, being after another dilatory Plea & a Judgm't thereupon *quod Respondeat Ouster* can never be good. Tis as known and settled a Rule as any in Practice that two delatory Pleas shall never be Allowed.

[Here follows a whole page [153] wholly illegible.—W. W. S.]

April 1730

[154]

MARKS *vs* DUNN *Ejec. Fr Deft.*

Matthew Marks was seized in fee of the Lands in Question and by his last Will and Testament devised several Parcels of Land. One to the Lessor of the Plt. and several other Parcels of Land to others but makes no disposition of any of his personal Estate except 3 feather Beds and in the last Clause of his Will he says, That his Will is that his Lands not disposed of (which are the Lands in Question) be sold by my Executors left in Trust to pay my Debts and Appoints Robert, Norbon and John Avery his Executors (dated 15 Aug't 1719).

The Executors the 13 June 1721. Exhibits their Account to the County Court by which it appears that the Personal Estate exceeded the Debts and Legacies £7.15 one of the Ex'ors died and the other John Avery by Indenture dated 8 Jan'y 1727. for the Consideration of 20.5. Conveyed the Lands in Question to Robert Glover who Sold to the Deft.

There are two Questions arising upon this Case 1. Whether* by the Surviving Ex'or be good or not. 2. Whether if the* as Debts were paid out of the Personal Estate* of the Purchasor

1. Some Books make a difference where Lands are Devised to Executors to sell, and where the Devise is that his Land shall be Sold by his Ex'ors. for in the first Case an Interest passes and if one Ex'or dies the other may sell. But in the other Case they have only an Authority and in that Case if one dies the other cannot sell* 113. a. b. Gold. 1-2. Dyer 219. Moor 61. Keil. 107. b.*

But the latter Authorities are otherwise, For my Lord Chief Justice Nayles says it hath been held That if a Man Devise Lands to be sold by his Ex'ors, that that will give an Interest — well as if the Land be devised to the Ex'ors to be sold Hard. 4 Barrington *vs* the Att. general

And the payment of Debts is a good Consideration and when the Land is sold the money is assets in the Ex'ors Hands at Common Law Hardres 405. 1. Lev. 224.

Therefore in this Case the Exors had an Interest as well as an Authority.

*Worn out, or torn, in the manuscript.—W. W. S.

But here the Exors are made Trustees and a Trust shall Survive

[155] As where a Man Devised that his Land should be sold by two Trustees, and appointed others Executors. One of the Trustees died, and the Survivor and Heir were Decreed to sell, because the Lands were tied with a Trust which shall Survive in Equity Hardres 204.

As to the Second point The purchasor is in by the Devisor, for if a Man Devise that his Wife shall sell his Land and died, and she take another Husband she might sell the Land to her Husband. Co. Lit. 112. And I take it to be a settled point, that in this Case the Purchasor is not concerned whether there be a sufficiency of the Personal Estate or not. But if he buy and pay, tho' there be sufficient to pay the Debts out of the Personal Estate yet he shall hold the Lands ag't the Heir and the Heir must take his Remedy against the Trustee. 2. Cha. Cases 115.

But where Land is devised to pay Debts particularly mentioned it is otherwise 1. Vern. 301.

There is in this Will no Disposition of the Personal Estate, but it is left to the Ex'ors to take it as Ex'ors or otherwise it must be distributed amongst the Children And the truth is that the Ex'or sold the Land that the Children might have something

Now there is a difference where Land is Devised to be sold for payment of Debts and where Lands are chargeable with the payment of Debts In the last Case the Personal Estate shall Exonerate the Real And if there be Personal Assets the Land ought not to be Sold, But in the other Case where the Personal Estate is disposed of (which indeed is not in this Case) the Personal Estate shall only come in aid of the Land if that be deficient 2. Vern. 7. 18. Wainwright vs Brudlows

Yet the Sale in this Case shall bind in respect to the Purchasor And it was Adjudged for the Deft. But the Heir has his remedy against his Ex'ors to reimburse him the value of the Land if there were personal Assets to pay the Debts.

GRAVES vs BOYD *Can. Fr Deft.*

The Case

The Plt. was seized of 125 Acres of Land with the Appurten's in King and Queen County and Boyd agreed to purchase it of him at 90£. price. The Agreem't was reduced to writing and Each party bound to the other in the Penalty of 50£. Boyd

entred and was in possession some time and Graves offered to Convey the Land when ever Boyd shou'd tender the Deeds, But Boyd finding himself very much imposed upon in the Bargain and the Land not being Conveyed quitted the possession and refused to go on with the Purchase And Graves Exhibits his Bill to Compel him to a Specific Execution [156] of the Agreement. There are several matters charged in the Bill as that Deft. had left the Houses in a ruineous Condition and impoverish'd the Land by working several Slaves upon it But this is denied and the Witnesses sworn in the Cause prove the Answer to be true And that the Bargain is a very hard and unreasonable Bargain

Two Witnesses swear that it is not worth above 30£ and another that he wou'd not give 15£ for it and another not above 10£.

There was at the time of Executing the Articles a Parol Agreem't that the Plt. shou'd make a good Title to the Deft. in another small parcel of Land of 25 Acres which he had purchased of one Griffin But had no Conveyance for it And this was to be thrown into the Bargain And the Plt. had forbid Boyd to occupy that, and refused to Convey it to him

Upon this Case it will be a question whether a Court of Equity will carry this Agreem't into a Specifick Execution altho the Deft. was in possession of the Land some time

I hope not for the following Reasons, first because the Plt. had not tender'd a Conveyance to the Deft. as by the Articles he ought to have done, And has refused to make the Deft. a Title to the 25 Acres Purchased of Griffin, But did forbid him to occupy it, Tho' it was part of the Agreem't as it is Sworn in the Answer Cro. Eliz. 517. For if the Plt. has made the first breach of the Articles he can have no pretence in Equity to Compel the Deft. to perform them on his part By reason of the unrighteousness and inequity of the Bargain The Agreem't is to pay 90£. which appears at most, to be worth no more than half that Sum And two Witnesses swear they wou'd not give above 10 or 15£. for it which is extremely hard and unreasonable

It is a Rule in Equity I agree to Compel the specifick Execution of Agreem'ts But there is no Rule which a Court of Equity will not depart from rather than do the least Injustice Or to do any thing that may be Severe and Oppressive on the one side, and unreasonable on the other to insist upon And that is

the difference between Law and Equity For a Court of Law adheres to it's own established Rules But a Court of Equity as it suspends the Rules of Law, so it will Supersede its own rules also

Therefore the Court will not only in some Cases refuse to carry Agreem'ts into a Specifick Execution, but they will give relief ag't unreasonable and unconscionable Bargains As where a young Man in the Lifetime of his Father buys Goods of a Tradesman And agrees to pay him five times the value at his Fathers death [157] Or where he sells the Reversion Expectant on the death of his Father at an under value in such Cases the Court of Chancery will set aside the agreem't To which purpose there are multitude of Preced'ts but they will not be allowed to come up to the present Case, yet they prove that the Court of Chancery will Regard the Reasonableness of Bargains, and it may be justly inferred that if in the Case of a young Man, whose Extravagancies lead him to do a great many Impudent Things and to make foolish Bargains will set aside his Agreem't They will not Compel a Man of riper Judgm't to perform an Agreement to give three times the worth of a Thing whether he be overreached by the other Party & outdone by his Superior Cunning, Or whether without any Art of the Seller, he thro' his own Indiscretion and folly makes such a Bargain

And altho' those who are Conversant in buying and Selling perswade themselves that there can be no wrong in insisting upon any Thing that is agreed be it ever so unjust or unreasonable

They must understand this is one of the great vices of Trade which cannot be justified in *foro Conscientie* however it may be Countenanced by Example and practice of great numbers of People It is not only a fraud and Deceit to disguise and Conceal the faults of anything we Sell but it is likewise a fraud to over rate a Comod. and to sell any thing at an unreasonable price either by taking Advantage of the Buyer's Ignorance or necessity (the Divines tell us) it's a Sin which nothing but restitution can attone for

Now if it be a Sin and a Man in Conscience ought not to Insist on an unreasonable Bargain; no Court of Conscience will Decree such a Bargain to be Executed.

But there are Preced'ts where the Court of Chancery have refused to Decree the Specifick Exon. of such Agreements as this As where the Father being in Debt agreed to give his Daugh-

ter in marriage more than he, her Mother and two other Daughters unpreferred wou'd have left, The Court Would not Decree the Agreem't but left the Plt. to Law. 2 Cha. Ca. 17. So in a late Case since the year 1720. a Bill was brought in the Exchequer for the Specifick performance of Articles for a Purchase made in that year whereby it was agreed that 40 years Purchase shou'd be paid for the Lands There was a Decree in the Exchequer for the performance, but it was reversed in the House of Lords

Obj. 1. Cha. Cases 42. An agreement in nature of Wager Decreed in Specie 1. Cha. Cas. 171. Agreem't by ten't in Tail shall bind the Issue in Tail if he Accepts it

But the Court were of Opinion it was no hard Bargain because there were several Houses upon the Land So they Decreed the Agreem't to be performed in Specie Yet the Houses were of no value [Missing.—W. W. S.] be good for nothing.

[158]

April 1730

ALLEN *vs* STAFFORD *Ejectm't Fr Plt.*

The Case.

William Stafford was seized in fee of 300 Acres of Land with the Appurtenances which descended to Amy Beesly his dauter and Heir, She ent'd and died Seized and by her last Will dated 9th of Ap'l 1664. Devised the Lands in these Words " I give and Bequeath my Dividend of Land & Plantation to my Cousen Humphry Stafford and in Case he die without Issue then to my Son in Law in England

Humphry Stafford the Devisee ent'd and was seized and by Deed dated the 16 of April 1668. and by *a'no* Deed dated 19th Feb'y 1679. for valuable Considerations Conveyed 90 Acres (the Lands in Que'on) to Townsend in fee and died 11 Dec'r 1684. and left Issue Humph'y his Son and Heir who died in the year 1669. about 31. years of age and left Issue the Lessor of the Plt. his Son and Heir who was born in October 1699. The Deft. derives a Title under Townsend and the Lessor of the Plt. claims under the Will of Mary Beasly as Issue in Tail to Humphry Stafford his Grand Father.

The Lessor of the Plt. *An'o* 1721. brought an Ejectm't ag't the Deft. and the Court 29th October 1723. gave Judgment ag't the Plt. upon the Act made 1662 Intituled Lands, five years

11

in possession, tho' that Act had been repealed from the year 1705.

But the Court very soon afterwards gave a contrary Judgement which was the Occasion of bringing this Action

That an Estate tail passed by the Will of Amy Beasly to Hum'y Stafford, the Grand-Father can be no Question, a Devise to one, and if he die with't Issue always Construed an Entail, King & Melling, 1. Vent. 214. 225. 9. Owen 29 Cozens Case And it is so Adjudged every Day in this Court Then the only Question that remains is Whether we are barred by any Act of Limitation

The Act of 5 years in possession cannot be a barr to us being Repealed, for an Act Repealed is of no more effect than if it had never been made So says my Lord Chief Justice Vaughan his Reports 325. & so it has been Adjudged in this Court upon this Act

Then there is no other Act of Limitation but that made in the y'r 1710 which Enacts that no Person which then had or thereafter might have any Right or Title of Entrey into any Lands &c. shou'd make any Entrey but within 20 years next after his right accru'd But there is a Saving that if any Persons that then had or thereafter shou'd or might have any right of Entrey was or shou'd be within age &c. he shou'd have 10 years after his coming of age to make his Entrey

[159] The Lessor of the Plt. at the time of making this Act was under age. He is now but 31. So this Action was brought within the 10 years which is Allowed expressly by the Saving Clause to all Persons who were under age at the time of making the Act, & I take it to be a clear Case for the Plt.

But it was insisted that the former Judgm't given upon the same Facts that are in this Case, and no different Title was shewed, that that Judgm't shou'd be a bar and two Cases in Salk. Fenwick and Gosvenor — and Withers and Harris — and the Stat. of 4. H. 4. were Cited

And five of the Court were of that Opinion

Which is a very strange Judgment, ag't a thousand Preced'ts and the nature of the Action.

April 1731.

[161]

DENN vs SMITH *Ejectm't Fr Deft.*

Ejectment upon the Demise of Dewberry for Lands in the county of Elizabeth City

Powell was seized in fee of the Lands in Question and by his last Will and Testament Devised the same to Mary the Wife of Ephraim Thomas in fee Thomas and his wife entered and were Seized in right of the Wife and by their Deed dated the 9th of April 1675 Acknowledged by them both in Eliz'a City County Court the Land was Conveyed to Owen Davis in fee; But it does not appear that the Wife was privately Examined — Davis's Estate is derived to the Deft. and the Deft. and all those whose Estate he hath Enjoyed these Lands peaceably and Quietly ever since the Date of that Deed until the bringing of this Action being 54 years or thereabouts

Mary Thomas died upwards of 50 years ago leaving Issue two Daughters Elizabeth and Mary then very Young Her Husband lived 10 Years after and died *An'o* 1690. Elizabeth was two Years and Mary 6 Months old when their Mother died

Elizabeth married at the age of Eighteen Giles Dewberry & both of them died in December 1716 the same Day leaving Issue two Sons Giles and Thomas Giles accomplished his age of 21. and died without Issue some time in the year 1719. and Thomas the Surviving Son and Heir to his Mother is one of the Lessors of the Plaintiff being about 22 years of Age

Mary the other Daughter married at 17 one Anthony Simons who died two Years after the Marriage she Surviving. Afterwards she Married John Roberts in the Year 1703. He died *A'o* 1711. and she died 1719. leaving Issue John Roberts the other Lessor of the Plt.

So Thomas Dewberry and John Roberts the Grand Sons of Mary Tho's under whose Deed we Claim entered and made the Lease to the Plt. the 1. Day of January 1728. The Deft. entered upon him & Ejected him

And the Question is Whether the entrey of the Lessors be Lawful or not Upon a Supposition that the Inheritance of the Lands in Que'on was not divested by the Deed *Anno* 1675. they have a Title as Heirs to their Grand Mother and we must not contend that point ag't so many Resolut'ns [162] of this Court That nothing can pass by the Deed of a Feme Covert unless she

Acknowledge it in Court and be privately Examined and the Exam'n entered upon Record

But I think they are barred by the Act of Limitation passed in the year 1710

Before I enter upon the Construction of that Act it will be necessary to shew two Acts of Limitation precedent to that in Order to make my Interpretation the more Intelligible

In the year 1662. an Act passed whereby five years peaceable possession of Land shou'd Confirm a Title with a saving to Feme Coverts, Infants &c. So as they shou'd prosecute their actions within five years after their Incapacities shou'd be removed

This Act subsisted till the year 1705 and then a new Limitation was introduced conformable to the Statute in England 21. Ja. 1.

That Act provided against Rights or Titles of Entrey that had accrued before the making the Act as well as such as shou'd accrue afterwards with a Saving to such as were Infants, Feme Coverts &c. at that time & to titles that shou'd afterwards descend to Persons under those Incapacities

The Limitation in this Act was to 20 Years and the Saving for 10 Years after full age, Discoveriture &c. But it happened to be Repeal'd by the late Queen on Account of other matters in it

Then comes the Act of 1710. which is in the same words as to the Limitation, with that of 1705

I do not intend to Argue that these Repealed Acts can have any Operation upon the Plts. Title, But it wou'd have been very hard if the Legislature in 1710 had left all the Antient possessions exposed to any Later Titles that might rise up ag't them, for many Titles were barr'd by the Act of 1662. which were revived by the repeal of the Act of 1705 particularly the Title of Mary the Mother of Roberts one of the Lessors of the Plt. for she was discovert before the Year 1703. and from that time the Act run ag't her and besides she must have been at least 31 Years of age at the time of making the Act

And the Mother of the other Lessor was likewise barred at that time because she cou'd not be less than 32 Years old Therefore it was highly reasonable in making the new Limitation to provide for such Titles as had been established under the old Law's Accordingly the Act of 1710. Provides " That

no Person or Persons that then had a right or Title of Entrey into any Lands &c. shou'd make any Entrey but within 20 Years next after their right or Title had descended, and in default [163] thereof they and their Heirs shou'd be utterly excluded and disabled from any Entrey to be made after Provided that if any Person or Persons that at the time shou'd have any right or Title of Entrey were under age. Feme Covert &c. they and their Heirs notwithstanding the 20 Years are expired might bring their actions or make their Entrey as they might have done before the Act So as they or their Heirs shou'd within 10 years next after the coming of age Discoverture &c. or Death, take Benefit of and Sue for the same and at no time after ten Years

So that altho' Infants and Feme Coverts were before barred by a long possession under the old Limitation, yet such as had a Title at the time of this Act were saved for ten Years after their disabilities shou'd be removed. But after that time the Act is express they and their Heirs shall be forever barred.

Now the Persons who had a Title to this Land in October 1710 the time of making the Act, were Eliz'a Dewberry and Mary Roberts whose Heirs the two Lessors are. Their Title accrued to them upon the Death of their Father who died about the year 1690. 30 years before the Act. They were in 1710 under Coverture. Dewberry & his Wife died in December following, in the same Day, then from that time the 10 years run upon her Heir (which was her eldest Son and now the Lessor Dewberry her Second Son) for the words are from the discoverture or Death. Roberts the Husband of the other died in 1711, from that time the 10 years run upon the other Lessors Mother who died *Anno* 1719.

This Ejectm't was not brought till 1728. So one of the Lessors is Eight years and the other seven Years too late.

But on the other side it will be argued, that the saving Clause in this Act ought to receive a more liberal and Extensive Construction in favour of Infants and Feme Coverts That if there is not 20 Years Clear of these disabilities the Act shall be no bar So that if a Title Descends to an Infant, being a Woman, and before she attains her age of 21. she marries and continues under Coverture many Years and leaves an Heir under age and that Heir dies before 31. and the Title Descends to another

Infant, that Infant may enter and bring an Ejectm't. And if such an Interpretation shou'd prevail it may happen that 100 Years will be no Security.

But it is not possible I think to Interpret the Act in that manner without doing the greatest violence to the words. Yet since the Gentlemen of the other side must labour such a Construction if they say anything I will deliver my Sense of this saving Clause as fully as I can.

The Clause consists of two parts one respects Titles accruing before the Act, the other Titles accruing after the first part only Concerns our Case [164] As to the other, the words are, that if any Person that shall have any Title of Entrey shall at the time of such right or Title first descended be an Infant. Feme Covert &c. such Person and his or her Heirs may not withstanding the 20 years are expired bring an Action or make an Entrey, so it be done within 10 years after coming of full age discoverture &c. or Death.

Now the words (first descended) do necessarily imply these follow'g points. 1. That if a Title shou'd descend to a Person under none of these Disabilities and he dies within 20 Years leaving an heir under age or under Coverture Such Heir cannot be within the Saving Clause &c but will be barred when the 20 years are expired

2d. If a Title first descend to an Infant and he dies before 31. or to a Feme Covert and she dies before discoverture and the next Heir be an Infant or Feme Covert, they must bring Action within 10 Years after the death of the Person to whom the Title first descended

3d. If a Title descend to a Feme Sole under 21. Years of age and she afterwards marries she shall not have ten years after her Discoverture to bring Action but must bring it within ten Years after her coming of age and so it was Adjudged in one Carys Case of Lincolns Inn A'o 1710. upon the Statute of King Ja. 1. as Mr. Booth told me, Because when one disability has attached, the Party or her heirs can have no Benefit of another Vide. Bro. Reading upon the Statute of Limitation 110 So at the Common Law no disability is regarded but what subsisted at the time of the first descent As we shall see in the 2d. Case following

If an Infant hath a right to enter upon another who dieth Seized & the Land descends to the Issue during the time that

the Infant is within age such Descent shall take away the Entrey of the Infant Litt. Sect. 402.

But if a Man seized of Lands in fee die his Wife *priviment ensient* with a Son and a Stranger abate & die Seized and after the Son is born he shall be bound by the Descent, because he at the time of the Descent have no right to enter Co. Lit. 241. b.

And tho if a Feme Sole of age takes Husband and a Descent is cast, that shall not take away the wife sentrey after discover'te Because no folly can be imputed to an Infant Co. Lit. 246. b.

Yet in that Case the Feme can only take Advantage of her Coverture in respect to her Infancy But that is a Case at Common Law & the words in the Saving Clause of this Act cannot be so Construed.

[165] But the Court gave Judgm't that the Lessor Dewberry was not barred for the moiety But that the Lessor Roberts was barred for the moiety of his Mother. Which depends upon a distinction that has no foundation. And is, I think clearly against the words of the Law

However the Court, upon the Precedent of Burwell & Meekins Case (*antea*) Dismist the Plts. Action because one of the Lessors had no Title and so the Lease not good.

HARRISON *vs* BLAIR *Indebitat. Assum't. Fr Plt.*

The Plt. brought an Action ag't the Deft. as Ex'or of one Hollinghurst upon an *Indebitatus* Assumpsit of the Testor. To which the Deft. with leave of the Court Pleaded 3. Pleas

1. That the Testor, did not Assume
2. That he did not Assume within 5 Years

And upon these two Pleas Issues were joined and found against the Defendant

The third Plea was that the cause of Action did not accrue within 3 years And at the time of this Plea pleaded there was an Act of Assembly, whereby Actions upon Account are Limited to 3 Years

But in the meantime that Act was repealed by Proclamation and then we Demurred. And the Question is Whether a Repealed Act shall be a Barr, being in force when the Plea was Pleaded

If a Repealed Act had never been held in this Court to be a bar I think this point wou'd not bear an Argument

Three Years was a bar only because this Act made it so. When the Act is made null it can be no longer a bar, This is common Sense A Law is always Repealed for taking away some Mischief which that Law Introduced, And to subject us to this Act, it is void, is unreasonable and a Contempt of the Authority that repealed it

The Lord Chief Justice Vaughan in his Reports 325. *Hill vs Good* Says, that an Act Repealed is of no more effect than if it never had been made.

The 28. H. 8. s. 7. makes all Marriages within the Levitical Degrees void The 28. H. 8. 6. 16. makes void all Dispensations of the See of Rome

The 1. & 2d W. & M. C. E. Repeals these Statutes or some of them The 1. Eliz. Repeals that and revives the other If a Marriage had happened while the Stat. of W. & M. was in force after the 1. of Eliz. it becomes void. So much may be inferred from that Case But there is a Case in the Year Book 4. H. 7. 10. & 10. H. 7. 22. which was thus A man Seized of Lands was attainted of High Treason by Parliament

[166] The King granted his Lands: Afterwards the Act of Attainder was Repealed and the Party restored, But in the meantime the Person Attainted Committed Trespass upon the Patentee for which he brought his Action And it was Adjudged by all the Justices that the Action did lie And Brian say'd the Deft. might have Trespass against the Patentee And the Reason is that repeal of an Act of Parliament puts everything in the same Condition as if no Act had never been made

The other side Admitted the Law to be so

And the Court gave Judgment for the Plt. *una voce*

¹POWELL vs FARREL *Appeal from Essex Fr Respond't*

The Respondent in Essex Court brought Ejectm't ag't the Appell't and a Special Verd't was found but no Damages assessed The Court upon the Verd't gave Judgm't for the Plt. releasing his Damages Judgm't was entered for the Land and Costs. And the Court here upon the Argum't were of Opinion with the County Court as to the Title

But Mr. Holloway moved to set aside the Judgment because the Damages being released the Costs were gone and Cited 3.

¹S. C. in MSS. Virg. Rep. in Congr. Libry. [Note by W. G.]

Leon'd Wood and Payn the Saying of Kemp Secondary, to that purpose

I insisted upon the Stat. of Glo'ster by which Costs are to be recov'd in those Actions where Damages may be recovered And the Court Affirmed the Judgm't for the whole *Vid* Röll & Danv. Abr. Titt. Error.

And the true difference According to the Book called Trials pr *pais* last Edition 243, is this, where nothing but Damages are to be recov'd and the Jury Assess no Damages the Plt. looses all the Benefit of the Verd't But where any thing else is to be recovered besides Damages As in Debt, Ejectm't &c. he may release his Damages and have Judgm't upon the Verd't for the rest *Vid.* 2. Keb. 545.

FREEMAN & *al.* *ads* HURST Adm'r of Hurst *Debt. Fr Deft.*

Debt upon a Bond Conditioned for the performance of Covenants in an Indre. The Deft. pleads Covenants performed. The Plt. assigns these Breaches. 1. That the Grantors were not Seized in fee and had not Power to Convey the Premises. 2. That the Land was Evicted by an older Title in Ejectm't brought &c.

The Defts. rejoin That Hurst the Grantee died before the Eviction To which the Plts. have Demurred and the sole question is Whether the Adm'r can maintain an Action for the breach of Covent

I think he cannot, but that the Heir ought to have the Action. [167] There are some Covent's of which none shall have the Advantage but the Party or his Heirs 42. Ed. 3. 4. Fitzg. Covenant 17. And those Covenants are such as are knit to the Estate Palmer 558. 2. Lev. 13. 92. 1 Vent. 148. 161. Raym'd 213. 2. Saund. 367. All Covenants for the Security of a Title are knit to the Estate, and the Heir shall have the Advantage of the Breach of them unless the breach of them be Committed in the lifetime of the Ancestor. There the Exor may maintain an Action. So it is ruled in the Case of Lucy and Lovington 1. Vent. 175. 176. 2. Lev. 26. But it is Admitted that if the Breach be after the death of the Ancestor the Heir must bring the Action, And the reason is plain, Because the Heir Sustains the Loss In the Case of Bull and Trankaster Winch 19. the Plt. as Ex'or brought Action and Declared, that the Deft. En-

feoffed his Testor in certain Lands and Covenanted that he was Seized of a good Estate in fee And assigns a breach, and after a Verd't upon a Motion in Arrest of Judgm't it was held by Hobart and Winch, that this Coven't was annexed to the Land, And the Exor cou'd not maintain his Action

So it is Clear that the Adm'r in this Case cou'd not have maintain'd an Action of Covenant. But this is an Action of Debt upon the Bond for the performance of y'e Covenants And the Heir cou'd not have an Action upon the Bond. Which must be agreed

Ans'r. The Bond and the Covenants cant be seperated. But the Bond depends upon the Covenants, where the Covenants are void, the Bond for performance of them is void also

Soprani and Barnardi *vs.* Skarro. Yelv. 19. and the same point is admitted Yelv. 13. If an Obligation be given for the paym't of Rent. and a Stranger enters whereby the Rent is discharged, the Oblig'n is discharged also. Brook. Title. Obl. pl. 6.

Therefore if there be a Connexion between the Bond and the Coven't one that has no right to an Action upon the Covenant cannot have an Action upon the Bond. Besides the Right and the Remedy must be Inseperable. And it is a Contradiction to say, that one Man has a Right to a Thing, and that another shall have a remedy to recover it. Whatever an Ex'or or Adm'r recovers is Assets. But if the Plt. in this Case shou'd recover he must Account to the Heir. So that to give them a Judgment will Occasion a Circuity of Action, which is against the Wisdom and Policy of the Law.

This I think is clear reasoning, and I pray Judgm't for the Deft. (*tamen*[?]).

But the Cause was ended by Compromise without Argument.

[168]

April 1731

BERRYMAN & Ux'R *vs.* COOPER & Ux'R *In Chanc'y Fr Plt.*

Mrs. Cooper was the Wife of John Bushrod and by him had two younger Children, the Plt. Sarah, and another Daughter. After the death of Bushrod upon a Treaty of Marriage between her and Willoughby Allerton she insisted that Allerton should give his Bond for the payment of £.100 apiece to the two Daughters, who were not so well provided for as the other Children

of Bushrod, Accordingly Allerton entered into two Bonds for the payment of these several Sums to the Plt. Sarah and the other Daughter and this was upon good Consideration for Mrs. Bushrods part of her former Husbands Estate was to vest in Allerton upon the Marriage and so she put it out of her Power to make any farther provision for these younger Children

The Marriage took effect and some time afterwards Allerton made his Will and gives considerable Legacies to his Wife upon Cond'n that she shou'd discharge these two Bonds, and died. She Accepts the Legacies and marries the Deft. Cooper and now they refuse to pay the Several Sums pursuant to the Bonds

The Plts. have Exhibited their Bill to Compel the Deft. to a Discovery and to pay the 100£. to them

The Deft. Mrs. Cooper in her Answer pretends that she only Intended that these two Sums shou'd be paid by Allerton in Case Allerton Survived her, not doubting but if she shou'd Survive him she shou'd have it in her Power to provide sufficiently for her Children as she shou'd think proper And she says that she does not know that her Husband Allerton gave her more on Acco't of these Bonds than he wou'd have done if they had not been in the Case

But it is observable that she says nothing of any Provision being Stipulated upon the last Marriage for any other Children And she has as much put it out of her power to do anything for them as she did upon her Marriage with Allerton And that she was Contented with Allertons Wills and therefore it must be supposed that his charging the paym't of 200£. upon what he gave her was no great hardship upon her

However our Case in short it this

Mrs. Bushrod Mother of the Compl't Mrs. Berryman upon her Marriage with Mr. Allerton upon the Consideration of her Fortune which was by the Marriage to vest in him Obtained a Bond for the paym't of 100£. to her Daughter the Compl't Berryman. Allerton by his Will gives her a part of his Estate and charges it with the paym't of this 100£ [169] She gets the Bond into her possession, and now refuses to pay the Money.

And the question is Whether we have not Equity sufficient against her and her present Husband to Compell her to it

It is true that her insisting upon this Bond was a voluntary Act, But it was a very prudent and Laudable Action to make some Provision for her Children when she was about to transfer

the property of all she had to ano'r Husband. It was her duty to do so Because Children have a sort of natural Right to a share of the possession of their Parents

When she had got that Bond there was a Right vested in the Compl't to demand the money when it became payable and no Subsequent Act of hers cou'd Controul or alter this right

Her keeping the Bond in her Hands and now endeavouring to Suppress it has only destroyed the Merit of what she did in obtaining it but can have no effect upon our right

A Voluntary Deed is for ever binding upon the Party that makes it his Heirs or Ex'ors—and cannot be revoked with't an Express power of Revocation reserved in the Deed.

So that if instead of this Bond from Allerton she had given her own Bond before her Marriage to pay each of her Daughters 100£. She and her Husband, during the Coverture, and after his death she alone wou'd have been liable to pay the money and no Act of hers cou'd have acquitted her of the Duty

Then if she cou'd have no Power to defeat the Bond in that Case, she must have as little in this

Where we have a right vested by the Act of another, first by the Bond and afterwards by the Will of Allerton who charged the payment of this Money upon the Legacies given to her

And tho' she says she does not know that he gave her more upon the Account of this charge than he wou'd have done without it, yet his Intent is clearly expressed in the Will, that some part of the Legacies were given to Enable her to pay this Money. And her Acquiescing under the Will & Submitt'g to the Charge by Accepting the Legacies, has with't Question made her liable

If she had not a good Bargain she might have renounced the Will: And in so Considerable an Estate as Allerton had the Law wou'd have intitled her to an Ample Provision And we must then have taken our remedy upon the Bond But as she has Got the Bond and the Estate out of which it is to be satisfied in her Hands we can only resort to her

As to Precedents, the Chancery Reports abound in Cases of this nature Villers and Branock 1. Vern. 100. The Lord Chancellor declared if a Man will Improvidently bind himself up by a voluntary Deed and not reserve a liberty to himself by a Power of Revocation, the Court of Chancery will not loose the Fetters he hath put upon himself, but he must lie down under his own folly. For if you wou'd relieve in such a Case you must conse-

quently Establish this Proposition That a Man can make no voluntary disposition of his Estate but by his Will only, which would be absurd Reeve and Reeve 1. Vern. 219. A charges Land in D with a [170] Portion for a Daughter by a first venter and then marries and settles part of the Lands for the Jointure of a second Wife, who has no notice of the Charge A believing the Portion wou'd take place of the Jointure gives other Lands in Lieu thereof, The wife by Combination with the Heir refuses to accept the Devise, But it was Decreed that the Daughter shou'd hold the Devised Lands till her Portion was paid Allen and Arme 1. Vern. 365. Where a Man in his Sickness made a voluntary Surrender of Copyhold Lands to the use of his Wife's Nephew, and afterwards married a Second Wife and had Children and made another Surrender to their use And sought Relief against the first Surrender to set it aside But the Lord Chanc'or declared he saw no Equity in the Case

Bale *vs* Newman. 1. Vern. 464 — fr Cur. a Voluntary Settlement's is not revokeable and the same cannot be Devised by the Will tho' for the payment of Debts.

Clavering and Clavering 2. Vern. 473. Old S'r Jas. Clavering 1684 makes a Settlement of an Estate subject to some Annuities in Trust for his Grandson and Heir and his Heirs & afterwards in 1690 makes another voluntary Settlement of the same Estate to the use of his Second Son for Life, and to his first and other Sons in Tail and by Will gives a considerable Estate to his Grand Son Altho' it was prov'd that James always kept the first settlement in his Custody & never published it And it was after his death found among his wast Papers And the Deed of 1690 was often ment'd by him and told the Tenants his Second Son was to be their Landlord after his death Yet he cou'd not be Relieved ag't the first Settlement, by the Decree of the Lord Keeper and Affirmed in the House of Lords

And it was Decreed for the Plts.

The Defts. Counsel insisted that the Bonds given upon what was disclosed in the Answer previous to the Executing of them might be Construed to be only in Trust for the benefit of the Wife in Case she shou'd Survive her Husband. Cited two Cases 2. Cha. Ca. 26. & 232. And two of the Court were of that Opinion. But neither of the Cases proved anything to the purpose but rather against such a Construction.

October 1731.

¹WADDY and Ux'r vs STURMAN & al. in Chan. *Fr Plt.*

The Case

John Jordan being possessed of a very Considerable p'sonal Estate sufficient to pay all his Debts with an overplus by his last Will and Testament in writing bearing date the 6th Day of February in the [171] Year 1693. gives several Legacies to his Sons in Law John Spence and Thomas Spence (who were Bothers) in this manner "I give to my Son John Spence 25[£] Steg. to be laid out in Negroes to be delivered to him upon the "Day of his Marriage also 4 Cows &c. Item I give to my Son "Thomas Spence two Negroes Mingo and Pegy to be delivered "at the Day of Marriage and ten Head of Cattle &c. But my "Will is, that if the s'd John or Thomas shou'd die without "Issue, that then whatsoever is Bequeathed to them the Sur- "vivor shall have to him and his Heirs and Assigns." The two Negroes were delivered to Thomas by Dorcas Jordan the Testors Wife and Exec'x, and he possessed them during his Life & died with't Issue in the Life time of John who had the Negroes in possession and died leaving only one Child (the Compl't Waddys Wife) After John Spences death Dorcas Jordan brought an Action of Trespass in the General Court ag't Laurence Pope and his Wife, who was the Widow of John Spence, for recovering Mingo and Pegy and a Child that was born of her And obtained a Judgm't Accordingly the 23. October 1700, ag't the Defts. The Compl't Jane being at that time ab't 2 Years old.

After the Judgm't the Negroes were taken by Execution & Sold or disposed of by Dorcas Jordan and are now with their Increase in the Possession of a Person in Maryland

And the Compl'ts have exhibited their Bill ag't the Defts. Exors of the last Will & Testam't of John Spence & the Surviving Ex'or of Dorcas Jordan, And the End of the Bill is to recover the value of these Negroes with Interest out of the Estate of Dorcas which came to the Hands of the Defts. Testor. They severally pleaded the Act of Parliament made in the 4th Year of the Reign of H. 4. And the Act of Limitation made in Virg'a Anno 1705, in bar to the Bill. And have Answered that John

¹S.C. in MSS. Virg. Rep. in Congr. Libry. and printed in Jeff. Rep. [Note by W. G.]

Sturman Acted jointly with other Ex'ors, that they paid all the Debts & Legacies, That they don't know that any part of the Estate came to his Hands seperately from the other Ex'ors. but they believe no part of it remained in his Hands at the time of his death The residue of the Estate being divided & distributed According to the Will & as to the Judgment they believe there was no fraud or Covin in the obtaining it. But that it was fairly given upon the Justice and Merits of the Cause

And that several of the Increase of these Negroes which were Recovered by the Judgement were disposed of by the Will of Dorcas & delivered Accordingly *Vid.* the Answer as to this

The first Question is Whether the Compl't — (Waddys Wife) hath any right to demand these Negroes or the value of them by the words of Jordons Will, And if she has, then whether the Judgm't by the Stat. [172] H. 4. or the Act of Limitation shall bar that right

As to the Compl'ts right to the Legacy given in Rem'r to her — after the death of Thomas. I think it is clear & the Rem'r good. For tho' the Law doth not allow the Rem'r of a Chattle (as Negroes were then) to be Limited after dying without Issue generally, Yet in a Will if a Man gives a Chattle to one and if he die with't Issue to another, that Rem'r is good. It is true in the Legal Construction of the words (dying with't Issue) a Man is say'd to die with't Issue when his posterity fails, if it be 100 Years after his death. But in Common Parlance, or According to the Vulgar Acception, a Man is said to die without Issue when he have no Issue at his death.

And wherever by the words of a Will the Vulgar Acception can take place Law and Equity will construe them so as not to frustrate the Testors Intent. So in this Case the Testor plainly Intended that if Tho's died with't Issue in the lifetime of John, then & not otherwise his Legacy shou'd go to John, therefore the Rem'r was good and vested in John when he Survived Thomas So is the Case of Pinbury & Elkins 2. Vern. 788. 766. where Chattels were Devised to one and if she died without Issue, after her decease to another It was held by the Lord Chancellor, that the words (after her Decease) shewed the Testors. Intent to be, that if she left no Issue living at her death the Rem'r shou'd take place and therefore Decreed Accordingly.

But if the Rem'r was not good the whole property vested in Thomas and then we claim as next of kin. Then consider the right Dorcas had to recover these Negroes It is admitted in the Case that she delivered them to Thomas and after that she had no right to demand them again, not even for the paym't of Debts, but the property absolutely vested in Tho's upon the Assent and Delivery.

So is the Case of Noel & Robinson. 1. Vern. 90. 2. Vent. 358.

Now as to the matter of the Pleas. The Stat. of H. 4. was never intended to take away the Jurisdiction of the Court of Chan'cy. As appears by the Case stated upon that Statute, and the Arguments upon it At the End of the first Cha. Rep. But if it did that Stat. cannot be carr'd farther in Equity than at Law and no Judgm't by that Statute can bar any but those who were Parties to the Judgm't.

So is the Case of Lock & Norborn 3. Mod. 143. As to the Stat. of Limitations that is likewise no bar in this Case, because it is a Suit for a Legacy And a Legacy is not within that Stat. Between Parker and Ash. 1. Vern. 256. By Lord Chancellor. [173] Now if we have a right and are not barred by either of these Statutes, we can by the Rules of Equity pursue the Estate of the Testor John Jordan or his Ex'or Dorcas into whose Hands soever it hath come.

So is the Case of Nicholson and Sherman Cha. Ca. 57. And if the Exors of the Surviving Exor of Dorcas have nothing in their Hands, and it be true that her Estate was deliv'd to several Legatees of her Will, we must make them Parties to the Bill and bring them to Answer.

And it was Decreed Accordingly by the Court.

¹THRUSTONT *vs* PRATT *App'l Fr Def't.*

Appeal from a Judgm't in Westmoreland Court in Ejectmt' Robert Howson was Seized in fee of 450 Acres of Land w'th the Appurt's and died leaving Issue three Daughters — Ann, married to Rice Hoe, Mary married to Charles Calvert, And Frances, who died unmarried.

8. Jan'y 1699, these three Sisters make Partition of these Lands Descended from their Father, and soon after Frances died with-

out Issue And Calvert and his Wife entered and died leaving Issue two Daughters.

These two Daughters have Legally Conveyed their Estate in the Premises to the Defts. Father John Pratt by Deed dated Jan'y 27th 1718.

The Lessor of the Plt. as Heir at Law of Ann Hoe entered into a Moiety of the part of Frances and Leased it to the Plt. The Plt. entered The Deft. ent'd upon him and Ousted him and he brought an Ejectm't in the County Court where Judgm't was given for the Deft. And now the Sole Question must be Whether the Entrey of the Lessor of the Plt. is not barred by the Stat. of Limitations

The Lessor of the Plt. was 33. years old in Feb. 1729, and Therefore if the Stat. did run upon him it must be Admitted that he is barred. But it will be Objected that the Stat. of Lim'n never runs ag't a Man but where he is actually ousted or disseised And that a bare possession or perception of Profits of one Parcener works no Disseisin of another Parcener According to the Case of Reading & Royston. 2. Salk. 423. And I admit the Law to be so. But that Case is to be understood Accord'g to Co. Lit. 373. b. thus

Where one Parcener entereth generally into the whole this doth divest the Estate which descended by the Law to the other. But where one Parcener entereth & Claims the whole; and takes the Profits of the whole that shall divest the Freehold in Law of the other Parcener

And where one Parcener enters into the whole and maketh a Feoffm't in fee this subsequ't Act doth so explain the Entrey [174] Precedent, that the whole is divested from the beginning

This being our Case, the Freehold was divested from the time of the Entrey of Calvert and his Wife, and from that time the Stat. of Limitations has run upon the Lessor of the Plt.

But the other side took the difference, that the Conveyance made to the Defend'ts Father was made by the Daughters & Coheirs of Calvert and his Wife, and not by Calvert and his Wife, who entered into the whole, And therefore the Conveyance cannot explain their Entrey And I suppose this Distinction induced the Court to give Judgm't ag't my Client

And I think it was a right Judgment.

GOODRIGHT Lesse of DAN'L MIDDLETON *vs* ANN BATSON *Fr*
Deft. Appeal from Northampton in Ejectm't.

The Case.

William Satchell was seized in fee of the Land in Question, and by his last Will & Testament bearing date the 7th Day of Jan'ry 1619. Devised in these words " I give unto my Youngest Dauter. Ellen Satchell 100 Acres lying upon the Sea side, to her and her Heirs forever " Then he gives his Daughter Grace Batson 100 Acres of Land adjoining upon Ellens 100 Acres, to her and her Heirs forever, and afterwards adds this Clause " And if either of my s'd Dauters. die without Issue the other shall take possession for her and her Heirs to enjoy forever, And if either of my s'd Daughters will not live upon the s'd Land, shall not sell it, or Otherwise dispose of it but let fall to the other that doth stay upon it, And if both leave it & go live upon other Land then it shall fall to my Son John Satchell And if both Daughters die with't Issue it shall fall to my Son John Satchell and the Heirs of his Body

After the death of the Testor. Ellen left the 100 Acres of Land and refused to live upon it, but having married one Thomas Middleton they by their certain Indenture dated 15th. of Xber,¹ 1680. Sold and Conveyed the Land in fee Simple

Cole by Deed Poll dated 3. July 1684 Conveyed the Land to William Kindal in fee, Kindal by Assigm't dated 28 May 1686. Conveyed it in fee to John Batson who was the Husband of the other Daughter Grace

John Batson by his Will devised this 100 Acres to his two Sons Francis and W'm with't Limitting any Estate, Francis I [175] Suppose was the eldest Son, being first named, but it does not appear by the Verd't Grace Batson the Daughter and Devisee of Satchell claimed the Land forfeited by her Sister, by breach of the Conditions in her Fathers Will and by her Deed dated 30. Xber. 1705, also Conveyed her Estate to Francis and Wm. Batson her two Sons And W'm Batson by his Deed dated 16th March 1713. Conveyed his part to his Brother Francis

Francis by his Will dated 22. Feb'ry 1725. Devised this Land to his Wife Ann Batson the Deft. for Life

The Verd't does not mention anything of the Possession, but it must be intended that has passed according to the several Conveyances.

¹December. [R. T. B.]

The Deft. and those under whom she Claims has been in Possession of the Lands from December 1680 till the bringing this Ejectm't which was Commenced in the Year 1729.

The Lessor of the Plt. is Son and Heir to Ellen Middleton who died in the Year 1711, and Claims a Title to the 100 Acres of Land Devised to his Mother by his Grand Father Satchell supposing that his Mothers Estate was never Legally devested out of her.

We have been in possession ab't 49 Years with't any disturbance and we are Purchasors under Ellen the Lessors Mother So that our Title is to be favoured.

Our Title is indeed deficient so far as we derive it under Ellen because she was Ten't in Tail by her Father's Will, and the Act of Limitation will not aid us because the Lessors Mother died within Eighteen years next before the commencement of this Suit, Yet I think the Deft. has a clear Title under the Deed from Grace Batson.

For the Land was Limited to her if her Sister refused to live upon it, and the Verd't finds that she did refuse to live upon it, So that her Title ceased, and the Title vested in Grace her Sister, as an Estate Tail by the last Clause of the Will (if both my Daughters die with't Issue &c.)

If it shou'd be objected that this is an Estate Condition repugn't to the Estate given to Ellen, and therefore void I answer. That there is no repugnancy in it, It does not take away any of the Essential Incidents of the Estate, but is a Temporary restraint during her Life, that if she wou'd Enjoy it she must live upon it

To give an Estate in Lands to one, upon Condition that another shall take the Profits, wou'd be repugnant & void But this is another Case. If a Man gives Lands in fee to another upon Condition that he shall not Alien, This is a void Condition, because it restrains a Power that is incident to the Estate. Yet if the Condition be that he shall not [176] Alien within any Number of Years, it is a good Condition 2. Lev'd 82. 3. Lev'n'd 182. Because the restraint is Temporary

In the Case of Sawyer and Hardy Moor. 400. Cro. Eliz. 414. Popham 99. Such a Condition as this was admitted to be good

But then if this be a Condition it will perhaps be Objected That Grace was but half Heir and so cou'd Claim only a Moiety as forfeited And if there had been no Limitation over it might be so. According to the Case 1. Roll. Abr. 410. 411.

Sometimes in the Case of a Will, where an Estate is given upon a Condition as to pay money the Judges will construe it to be a Limitation in Order to fulfil the Intent of the Testor. As in the Case of Wainsworth and Pretty's Rolls. Abr. 411. Cro. Eliz'a 833. 919. 920. And see Danv. Abr. 9. pl. 3. and the Notes

But when Lands are Devised to one upon Condition that the Devisee shall do an Act, and if he does not do it, that the Land shall go to another. There the Condition determines the Estate of the Devisee and the Limitation over intitles the Person in Rem'r to the Land

So is the Case of Porter and Try 1. Vent. 199. 200. 1. Mod. 86. Where Lands were Devised to B upon Condition that she wou'd Marry with the Consent of her Grand-mother, and if she did not to C. It was Adjudged That upon a breach of the Condition the Lim. carried the Estate over to C. and when the Cause was brought into Chancery to be relieved ag't the Condition. 1. Mod. 308. C. B. Hats calls it a Conditional Limitation, for there is a Condition to determine the Estate of the first Devisee and a Limitation to Let in the other

And chief Justice Vaughan says 311. that it must be so by the Stat. of Wills which gives every Man a Power to devise his Estate at his Will and Pleasure, *i.e.* Absolutely upon Condition, upon Limitation or any way that the Law warranteth

Then in this Case allowing that there is a Condition in one part of the Clause upon the breach of that Condition the Estate is Limited over to another, and this Limitation is good by the Stat. of Wills and vested the Title of the Lands in Question in Grace Batson. Therefore I pray Judgm't fr the Deft.

But the other side insisted that the breach of the Condition [177] only defeated Ellens Estate, during her Life and not since her death the Estate tail shou'd rise again for the benefit of the Issue

To which I answered that the Condition According to the Rules of Law must defeat the whole Estate 1. Rep. 86. 6. Rep. 408. which being a clear point the Court gave Judgm't for the Deft. (my Client) Tho' it was urged by the Plts. Council, that by the Limitation Grace had only an Estate for Life in her Sisters 100 Acres

But admitting it to be so. If Ellens Estate was defeated the Lessor of the Plt. has a good Title, For the Testors. Heir in that Case wou'd be Intitled to the Fee.

¹LAWSON *vs* CONNOR *Ejectm't Fr Plt.*

The Case.

Anthony Lawson was Seized in fee of 900 Acres of Land with a Parcel of Marsh adjoining and by Deed Poll dated 6. Sep'r 1693. for a valuable Consid'n say'd to be paid gives unto John Fulcher a Moiety of these Lands for his Life, and after his Death to revert to the Grantor, Then after his decease he gives a Moiety of the Land to his Son Tho's his Heirs & Assigns, And the other Moiety in the same Deed he gives in these words " And the other " half of the s'd 950 Acres of Land that is to say, the Norther- " most half with an equal proportion of the Marshes to the " whole adjoining I do freely give to my Son Anthony Lawson " and to his Heirs and Assigns for ever to be possessed therewith " immediately after my Decease There was a Division made of the Land by an East & West line, And held Fulcher had a House and Plantation on the North side of the line, during his Life

The Grantor has Issue Tho's his eldest Son and Heir by one Venter, and by the second Venter Anthony in the Deed mention'd and two Daughters Margaret the Wife of Charles Sayer and Elizabeth Late Wife of the Deft.

Anthony died in the lifetime of his Father without Issue. The Father died in the Year 1701. Tho's enter'd and held the Land together and undivided with Fulcher and died leaving his Wife Ensient of a Son the Lessor of the Plt. After the death of Fulcher the Deft. ent'd A'o 1712. into the moiety given to Anthony and held it ever Since, And Charles Sayer and his Wife have Conveyed their right to the Deft.

The Question is Whether anything passed by this Deed to Ant'o the Son

[178] And I suppose the other side will insist That because Fulcher lived upon the Northern part of the Land which was Intended to be given to Anthony the Deed shall be Construed to give that moiety to Fulcher for Life, Rem'r to the Grantor for Life, rem'r to Anthony in fee, And then the Deft. will have a Title by marrying one of Anthony's Sisters and by Conveyance from the other Sister, they being Sisters of the whole Blood and Heirs to Anthony

For if the Estate given to Anthony was to pass by way of

¹S. C. cited in W. G's Barradall 236. [Note by W. G.]

Remainder, then it will not be material Whether he was ever Actually possessed of the Land

Now this is the Case of an Heir at Law & nothing is to be taken by Implication nor will the Court supply any words in prejudice to the Heirs title

It does not appear by the Deed whether the Northern Moiety or the Southern moiety was intended to be given to Fulcher And his living upon the Northern moiety being a matter of Ex-post *facto* cannot Influence the Construction of the Deed Neither was the dividing line intended to set a part Fulchers moiety But it is Agreed that after the death of Anthony the Father that Thos. his Eldest Son entered and held the Land together & undivided with Fulcher So that this dividing line cannot affect the Case and the words of the Deed. That after the death of the Tenant for Life the Land shou'd Revert to the Grantor are of no Signification, for the Reversion in fee remained in him and wou'd vest again in possession of him or his Heirs after the death of Fulcher if these words had been Omitted. Then he proceeds and gives one moiety to Tho's & Heirs Habend, after his death & the other moiety to Anthony & his Heirs Habend. likewise after his death, So that nothing was intended to vest in Anthony either in possession or Rem'r till after the death of the Father

It can't be Construed to be a Rem'r in Anthony because there is no particular Estate to support it But it is merely a Grant of an Estate of Inheritance to Commence after the death of the father and no such Estate can by Law be granted

So is the Case of Pitfield and Pearce March 50. where a Case is Cited to be Adjudged in the Common Pleas That a Gift of a Rem'r after the death of the Grantor was void This Case of Pitfield & Pearce is Reported in 2. Rol. Abr. 789. Title Uses & is Cited 1. Vent. 139. 3. Lev. 372. [179] and the Authority of it not disputed Tho' it is questioned by Pollexsen in an Argument of his in his Reports 529.

If that be Law, nothing passed to Anthony, but the Inheritance descended to the Lessor of the Plt. as Heir to his Grand-father Therefore I pray Judgment

On the other Side, it was argued that this Deed might be Construed a Covenant to stand Seized, and that the Judges of late Years, if it were possible, wou'd find ways, that Mans Deeds might take effect According to their Intents and not be

destroyed by a rigorous Construction, upon a seeming Repugnancy to the Rules of Law

And 1. Vent. 137. Crossing and Scudamore 1. Vent 372. Pybus and Midford. 3. Mod. 237. Harrison & Austin 3. Lev. 370. 2. Lev. 225. And the Court gave Judgm't for the Deft. upon the Authority of those Cases, which do in my Opinion destroy the Authority of Pitfield and Pearce's Case. So I think it is a good Judgm't.

BARRET *vs* GIBSON. *Case Fr Plt.*

Special Action upon the Case upon the Act of Assembly A'o 1712. for appointing Rolling-Houses

The Plt. Declares That the Deft. was keeper of a Publick Rolling House Established by the Act of Assembly, and did Receive from the Plt. 4 Hhds. Tob'o of the Plts. to the value of 40£. to be safely kept & redelivered to the Plt. when required And that for want of care & by the Defts. Negligence the Tob'o was lost

The Deft. being an Infant appeared by his Guardian and Pleaded not Guilty And the Jury find a Special Verd't to this Effect That the Deft. was keeper of a Rolling-house that had been a publick Rolling-House ab't 30 years & did receive 4 Hhds Tob'o of the Plt. & that the Rolling-house was maliciously burnt by a Negro Woman of the Defts. whereof she was Convicted. That some part of the Tob'o might have been saved but the Deft. did not endeavour to do it, And the Jury conclude, that if the Deft. is by Law chargeable with the wilful burning of the House, then they find for the Plt. 22. 16. 1 p. Otherwise for the Deft.

The question left by the Jury to be del'd in point of Law depends upon the Construction of the Act of Assembly upon which the Action is grounded. And the words of the Act are "That the Owner or keeper of such publick Rolling-House shall "be liable to an Action at Common Law for any Tob'o Goods or Merchandizes which shall be lost [180] out of such Rolling House and for any Damage which shall or may happen to such Goods, Merchandizes or Tobacco during the time they shall be in Custody or under the care of such owner or keeper of a Roll'g House for want of due care or by the neglect of the Owner or Keeper of such Rolling-house, his Servant or Servants, to the Owner or Owners of such Tob'o &c.

Now the Jury have found expressly a Negligence in the Deft. in this Case that some part of the Tob'o might have been saved But the Deft. did not endeavor to save it, Therefore by the words of the Act he must Answer for the value of the Tob'o to the Plt. But if that had been out of the Verd't he must be liable to us for the Damages we have Sustained in the loss of this Tob'o clearly by the words of the Act.

The malicious burning of the House by one of his Serv'ts Her being Convicted of the Felony and Executed for it can make no difference in the Case, for if one of his Servants had Stole the Tob'o there wou'd have been malice and a Felony, yet no body will say that shou'd excuse the Master, because the Act expressly says that the Keeper of the Rolling-house Shall be liable to an Action for any Tob'o that shou'd be lost out of the House. Nay by these words he must be answerable if a Stranger shou'd break open the House and steal the Tob'o So I think the malice or Felony will not be Considered at all in excuse of the Deft.

For if a Servant burn a House out of malice to his Master there may be a fault in the Master, either in provoking the Servant by ill usage to do him such an Injury, or in keeping a Person of so Vicious and wicked Disposition about him

Besides the Law will construe it a want of care & Negligence of the Master not to keep a Person in or near the House that may upon Occasion be ready to prevent a fire, or to put it out. And if such a necessary Caution had been taken by the Deft. in this Case in all Probability the misfortune had not happened

But the Master is here made liable for the Acts of his Servant and it is reasonable it shou'd be so for it cannot be just that a Person who trusts his Goods to the care and Custody of the Owner of a publick Warehouse shou'd Suffer by the malice of his Servants or by their Negligence So it is at the Common Law

If any Servant burnt my House and by that means my Neighbours house is burnt I am liable to an Action for the Damage. 2. Rol. Abr. 2. pl. 3. Fitz. Action upon the Case 25. Brook 30.

[181] If I give a Servant Money to defray the Charges of my Housekeeping & he buys the Necessaries for my House, but keeps the money & does not pay the Tradesmen, I am chargeable, for the Master at his Peril ought to take care what Servant he

employs and it is more reasonable he shou'd Suffer for the Cheats of his Servants than Strangers Fr Holt in Dr. Robert Waylands Case 3. Salk. 234. So in the Case of a Carrier If a Carrier takes Charge of Goods and is robbed he must Answer for them. 2. Mod. 270. Adjudged And *a fortiori* if he is robbed by his own Serv'ts he shall be liable

But there is another Question arising in this Case in respect of the Infancy of the Deft. for it appears by the Record that the Deft. is an Infant. The Case in 1. Rol. Abr. L. (D) pl. 3. will be mentioned Viz. If an Inn comes to an Infant and he keeps it and his Guests are robbed, no Action lies ag't the Infant.

But there is this difference between that Case and this, In that the Action is given by Custom of the Kingdom, or by Common Law, and in this the Action is given by the Statute

Where an Act of Parliament gives an Action, Inf'ts & Feme Coverts shall be liable. It is a settled point Therefore if a Feme Covert or an Infant Lessee for Life commits Waste and the Lessor recovers in an Action of Wast, it shall bind the Infant & feme Covert, because the Stat. gives the Action 8. Co. 44. b. Wittinghams Case.

So if an Infant & Feme is Goaler and suffers an Escape upon Execution they Shall be answerable for the same Reason 2. Inst. 382. 8. Co. 446. And upon the whole matter I pray Judgm't for the Plt.

But the Court gave Judgm't for the Deft. because the Master is not Chargeable for the wilful wrong of his Servant. *Vid.* Jones & Nail 2. Salk. 411. Ward & Evans *ibid.* 442. something to this purpose.

WILLARD vs PERRY. *Appeal Indebitat. Fr Appell't.*

The Case.

Christopher Beverly by Indre. bearing date the 30. of March 1723, made between him of the one part & Jno. Perry of the other part Demised to Perry & his Wife 100 Acres of Land to hold to them during their lives, and Perry & his Wife, Coven't for Repairs, And then followed this Clause "And also that "neither the s'd John Perry, Mary Perry, nor either of them "shall Bargain, Sell, Assign, Demise, or Let, the s'd Land "with't the License & Consent of the s'd Christop'r in writing "first had & obtained." This Indre. was not Sealed by Mary &

was not Recorded, Mary by Indre. bear'g date in the Year 1724. Demised the Land to the Deft. during her Life for the Yearly Rent of 600wt of Tobacco.

[182] Christopher Beverley, after the making this Lease ent'd and ousted the Deft. who sometime afterwards became Beverleys Tenant and has since paid him the Rent.

Mary Perry the Plt. below brought an Action of Debt against the Deft. for 2520wt. of Tob'o for Arrearage for the Years 1725, 26, 27 & 1728, due upon a lease of a Plantation in the Parish of St. Ann in the County Demised by the Plt. to the Deft. at the Yearly Rent of 620wt. of Tob'o to be paid on the 25 Day of December Yearly.

This is the Substance of the Decl. & now upon the Case agreed between the Parties in the County Court there is no such Lease, for the Lease upon the Record is of a Rent of 600wt p'r Annum with't any Day of payment And the Court have given Judgm't for 1800wt. Tobacco from which the Deft. has Appealed

Now with't entring farther into the Cause, this variance Destroys the Plts. Judgment. But by the agreeing of a Case below in which the Parties conclude that if the Plt. has a right to the Land, they agree she shall have Judgm't for 1800wt. of Tob'o. It will perhaps be urged that this Advantage is waved.

And Admitting it to be so I will Consider the Plts. Title which is liable to many Objections. 1. Mary Perry the Plt. is no Party to the Lease made by Beverley. And therefore by the Rules of Law con'd take no Estate.

But to this perhaps it may be Answered that she shall take notwithstanding; being Named in the Premises & the Habend.' According to the Case of Windsmall & Hubbard Cro. Eliz'a 57. 2. The Covenant that the Lessors shou'd not assign their Interest with't License is likewise a Condition, and if so the Lease made to the Deft. was a breach and the Lessor might Lawfully enter

All Deeds ought to be Construed so as the Intent of the Parties may take effect, The Intent of the Parties here is plain, that the Lessees Interest shou'd not be Assigned, and it's certainly very fit that if one party will wilfully and inexcusably Act contrary to the Agreem't that the other shou'd have some remedy. Now if this Covenant shall not be Construed a Condition as well as a Covenant the second Lease must be good and so the first Lessors Estate must pass from him upon other Terms than he intended

and he can have no remedy ag't the Person that made the breach of the Covenant For the Plt. being a Feme Covert if she had been a Party the Covenant cou'd not bind her & so she cannot be punished for a breach of it.

[183] Therefore in Order to give the whole Deed an Opinion and to make it ineffectual in all its parts since no other Expedient can be found out this Clause ought to be Construed a Condition.

There are several Cases where a Covenant has been construed a Condition 1. Rol. Abr. 407. 408. *ibid* Whitcock — 2. Bulst. 290. agreed by all being upon a Lease for Years which may determine as well as begin by Contract But in that Case it is expressed That a breach of the Covenant shall be a forfeit of the Land.

Then there is the Case of Simson and Tittorel 1. Rol. Abr. 410. Poph. 116. 117. Cro. Eliz'a 384. 385. and in many other Books, but in that Case there is the word Provided to Introduce the Covenant.

The differences between these Cases and ours are not very essential where the Intent is more to be regarded than the words. However 3d By the Virg'a Act A'o 1710 nothing passed by the first Lease for want of Recording *Vid.* the Act, So the Lessors entrey was Lawful.

And in Consequence of the Plts. wanting a Title to the Land she can have no right to the Rent, for the Lessee being Legally ousted by the Lessor the Rent reserved must Cease And this is not like the Case of Collins and Carpenter 1. Rolls. Abr. 605. Where Lessee for Years causes a Stranger to enter upon him yet the Lessor shall have an Action for the Rent S. C. Yelv. 73. Same Case Cro. Ja. 300. Humphry & Damian.

But at the time this Action was brought no Action of Debt wou'd lie for Rent upon a Lease for Life, for this we may go to the Act passed last Session

And the Court gave Judgm't for the Appellant.

EPPES *vs* REDFORD *Indebitat. Ass't Fr Plt.*

The Plt. Declares that one Thomas Hulsey was Indebted to him £.12. by Bond, that he intended to sue him upon the Bond And that the Deft. in Consideration the Plt. wou'd forbear promised to pay it for the Deft. and avers forbearance. Upon Non Ass't we

proved the Debt due from Tho's Hulsey to the Plt. and that the Deft. promised to pay it, and we likewise proved that Hulsey who is since Dead was at the time of the Promise in the Defts. Service But it being insisted at the Trial that we ought to prove the Consideration expressly as it is laid in the Decl. the Jury found a Special Verd't that Hulsey was Indebted as the Plt. in the Decl. hath set forth, and that the Deft. promised to pay it And the Question is whether this Evidence will Support the Declaration and prove the matter in issue

I conceive it does For there are Cases. Cro. Eliz. 201. Huth. 50. [184] Where it is say'd the Consideration must be proved Yet we are not obliged to prove the Consideration precisely as it is laid This appears in Linley's Case. Clayton 145. Where it is said the Judge did at first Hesitate whether the Plt. did not fail in his whole Cause, because the Consideration was not as he had made his Case but was after satisfied that the Law was otherwise But a Case more strong to this purpose is that of Holdich and Broderick 2 Rolls. Abr. 681. pl. 6. Where the Plt. declared that I. S. was Indebted to him 1130£. & Appointed the Deft. to pay part of it That afterwards I. S. paid 1050£. & in Consideration the Plt. wou'd forbear the rest 64£. till ano'r Person shou'd pay the Deft. that Sum which he owed him The Deft. promised to pay it The Deft. pleaded Non Ass't and the Promise was proved And the Deft. wou'd have discharged himself by proveing that the Person that owed him the 64£. had not paid it But by the Opinion of all the Judges at Serjeants Inn in Fleet Street Except Jones and Littleton, The Issue is only on the Promise and that Evidence wou'd not help the Deft., tho' it is shewed the Plt. had no Cause of Action But he Shou'd have Traversed the payment of the 64. and Confessed the Promise

Then in this Case as we have proved part of the Consideration [So] That H. was Indebted to the Plt. nothing remains but the Plts. promise to forbear which is the rest of the Consideration

It was admitted at the trial that the Plt. need not prove his Averment But that that ought to come from the Deft. if the Plt. did not forbear Now upon the Evidence of the Debt & the Defts. promise to pay it, the Plts. Promise to forbear shall be intended, for it cannot be supposed that the Deft. shou'd be chargeable upon his Promise if the Plt. did not forbear Hulsey Nor can it be supposed that the Defts. Promise was made on any

other Consideration than that of forbearing the Principal Debtor So is the Case of Sadler and Hawkes 1. Rol. Abr. 27. pl. 49. 1. Danv. 56. Where if A. is Indebted to B. and C. Promises that if A. will not pay him in Convenient time he will This will be a good Consid'n for B. to have an Action ag't C. because it must be intended there was a Promise to forbear A. in the mean time

According to that Case if the Plt. here had no need to have set forth the Consid'n as he has done since the Law wou'd intend it to be so Then it must follow that tho' it is not expressly proved that the Deft. Actually spoke these words " In Consideration that you shall forbear [185] Hulsey I promise to pay you the money, But only that he promised to pay the Debt without more words, that Evidence is sufficient to charge him Because the Agreem't of the other side to forbear must be necessarily Intended and implied altho' nothing was say'd about it

And the Court in April 1732. Adjudged that the Evidence did Support the Issue, tho' it is ag't the Opinion of all the bar Yet I think it was a very good Judgment It being admitted that the Plt. did forbear Hulsey Otherwise no undertaking of one Person to pay the Debt of another can be of any force unless he pronounces the words as they are laid in the Decl. Whereas the pronouncing those words cannot be material when the Substance of the Consideration was forbearing Hulsey and Accepting the Deft. for his paymaster which was allowed to be so upon the Trial

¹WAUGHOP *vs* TATE & UX'r. *Appeal Fr Plt. in app't.*
Appeal from Northumberland.

The Case.

John Contancean an Infant by Deed dated the 17th Dec'r 1718. Conveyed several Negroes to Richard Ball for the proper use and Behoof of Peter Contancean and his Heirs who was his Brother of the half Blood J. C. made his Will the same Day but nothing of these Negroes is mentioned in it The Heir at Law of John possessed herself of the Negroes and under Waughop Claims

The Plts. Wife is heir to Peter and brought Detinue ag't Waughop and recovered and from this Judgm't he has Appealed And the only Question is Whether the Deed of I. C. be a good

¹S C. in MSS. Virg. Rep. in Congr. Library. [Note by W. G.]

Deed in Law And I think all the Books ag't it The Case of Thompson and Leach and the Opinion of the Court there 3. Mod. 310. is expressly that the Deeds of Infants have only the form but not the Operation of Deeds But it may be objected from the late Explanatory Law of the Negro Act *An'o* 1705. that because it is declared that Infants may at the age of 18. by Will dispose of their Negroes, Therefore by the Equity of that Act this Deed may be construed a good Deed to pass the property of the Negroes

Construed strictly and not with any Equity

Answer It is a Settled point that the Statutes of Explanation must be Construed strictly and not with any Equity or Intendment Cro. Car. 34. On the other side it was Insisted that this Deed may be Construed as part of his Will, and the Case of Green and Proud. 1. Mod. 117. and the Case in Moor where a Lre. was construed a Will were Cited And if it cou'd not be Construed as part of a Will, it may be a Codicil and the Court gave Judgm't upon that point below for the Plts. that the Deed shou'd be construed as part of the Will, tho' it appeared clearly by the Deed and the Will to be Otherwise And accordingly they had different Operations The Will did not take [186] Effect till after the Death of the Testor. But the Deed had all the effect it cou'd have upon the Delivery And I think it very Strange that it should be now construed to operate as part of the Will when such a Thing was never intended in the Beginning But it was delivered as a Deed at the same time that the other was published as his last Will I gave my Opinion to my Client before the trial in the County Court that he had the property of the Negroes in dispute And I believe any Lawyer in the World wou'd have given the same Opinion

¹WAUGH *vs* BAGG. *Appeal Indebitat. Ass't Fr Appell't*

Appeal from a Judgm't of Essex County Court. Waugh the Plt. below Declared that the Defts. Testor. was Indebted 20 Sep'r 1724. 224Swt. of Tob'o and in Consideration thereof Assumed to pay it And for non paym't Declares for 20£. Stg. Damage The Debt. pleaded non assumsit and Action non. within three years And to that Plea there was a Demurrer and

¹S. C. in MSS. Virg. Rep. in Congr. Libry. [Note by W. G.]

Judgm't for the Plt. and a Writ of Enq'ry was awarded and thereupon the Jury assessed 20£. Damages.

Sep'r Court 1730, the Deft. moved in Arrest of Judgment, assign'g several frivolous Causes, and the Cause was continued for Arguing the Exceptions till March following and then the Deft. moved for a new Writ of Enquiry which the Court Awarded accordingly, for which Reason the Plt. has Appealed And I conceive there is Error in the Judgm't

1. Because excessive Damages is not sufficient cause for a new Writ of Enquiry, So it is held 1. Mod. 2.

2. The Damages here will not be held excessive

In the Case of Nurse and Barnes, where the Plt. Declares that the Deft. in Consideration of 10£. promised to let him Enjoy certain Iron Mills for 6. Months and it appeared that the Iron Mills were worth but 20£. pr Annum and yet Damage were given to 500£. by reason of the loss of Stock laid And p'r Cur. the Jury may well find such Damages for they are not bound to give only the 10£. but also the Spl. Dam. Raym'd 77.

So here the Special Damage is in delaying the paym't of the Tob'o about six Years

And the Judgm't was reversed

April 1732

[187]

FLEMING vs DIGG's. *Case Fr Deft.*

The Case, Dillon was Indebted to Diggs 8. 1. 7. Curr't Money He arrests him and the Court held him to Bail.

Dillon in the Custody of the Sherif confesses Judgm't for the Debt and Judgm't is entered up ag't him accordingly the 20th May 1730 But no Order was entered for Committing him, nor was he charged in Ex'on. But he was Committed by Order Ore tenus. Dillon before the Court gave in a Schedule of his Estate upon Oath, According to the Act of Assembly 1726. And the Court thereupon Ordered the Sherif to discharge him And for obeying that Order the Plt. hath brought this Action ag't the Deft. who was the Sherif of Gooch'l'd County where the Proceedings were

The Plt. in his Decl. sets forth that Dillon was Indebted to him 8. 1. 7. That he Arrested him and he confessed Judgm't in Custody of the Deft. and that the Plt. intended to charge him in Execution but the Deft. suffered him to make his Escape

The Plt. By the Act of 1726. the Court had a Power to discharge Dillon, if he had been charged in Execution. Of this there can be no doubt But as the Plt. had not actually charged him in Ex'on. it will be argued for the Plt. that he is out of the Act; That the Court did wrong, And that the Sherif is Answerable for their Error

But I think it is clearly ag't the Plt. every way, It is generally true that a Man shall not be in Exec'on. with't the prayer of the Party tho' he be in Custody, and the reason of this is in favour to the Officer in whose Custody he is. That he shou'd have Special notice of every Judgm't ag't his Prisoner, because he can't be Supposed to know every Judgm't against every Prisoner This is clear in the Cases 1. Rol. Abr. 894. 895. 896. Salk. 272. 1. Keb. 775. 764. But where a Man is Committed for want of Bail, by the Court at the prayer of the Plt. and he confesses Judgm't in Custody, and then the Sherif Imprisons him, the Sherif must know him to be charged with that Judgment, and there needs no other prayer to charge him But the Law will suppose him in Execution without any more

So is the Case of Garnon. 5. Co. 88. and Bonner & Stukely 1. Rol. Abr. 895. & Dyer 368. Cro. Eliz'a 707. Where the Deft was taken upon a Capias Utlagatum [?] and Committed, he was held to be in Execution, for the Plt. without prayer Because the Outlawry was at the Suit of the Party. See the Case in Dyer

But certainly the Court here and the Sherif knew the Cause for which Dillon was Committed and it cou'd not be without the desire of the Plt. And when he delivered up his Estate According to the Act they had Power to discharge [188] him by any Reasonable Construction that can be made of it. Otherwise this Dillon and all Persons in the same circumstances must be in Prison at the Will of their Creditors 'till they shall be disposed to charge them in Execution, and what real difference can there be between this Case of a Man imprisoned upon an Execution certainly there can be none Or what Damage has the Plt. Sustained. Since if he had charged Dillon in Execution, As the Decl. says he intended, the Discharge must have been Legal

But if this point were Otherwise the Sherif is not Answerable in this Case If the Court made an Erronious Order in a matter that they had Cognizance of the Sherif must not dispute with them, but is bound to Execute their Order

So is Bushes Case Cro. Eliz'a 188. Sherif of Durhams Case *ib.* 576. 893. Dunry's Case 5. Co. 142. 143. Mr. Kelleys Case 9. Co. 68. 2. Leon'd 84. 85. Cro. Ja. 28. 8. 9. *Arguendo.*

Besides here the Cause of Action is for 8. 1. 7. which is too low a value for this Court to take Cognizance of If it be objected that there is another Reason why a Man shall not be in Execution without prayer of the Party, because perhaps he may chuse another Exec'on

According to the Case in 1. Rolls. Abr. 895.

It may be answered that of his own Shewing he intended to Charge him in Execution So that there is nothing in this Cause but a little Law, Cunning and contrivance and a vain Attempt, I hope to make an Innocent Man pay a desperate Debt, There is no wrong done to the Plt, No fault in the Deft. I pray Judgment

And the Court gave Judgm't for the Deft., Only Mr. Grymes Dissented, because he was of Opinion Dillon was not in Ex'on.

GODDIN *vs* MORRIS & Ux. Ex'. STANNUP & ADM'L GODDIN AND KEILING. *In Chan'ry. Fr Plt.*

The Case Goddin the Plts. Father having a small Estate in the Year 1710. died Intestate His Wife obtains L'res of Adm'on, and in October 1710, Exhibits an Inventory of the Estate which consisted of Cattle and Household Goods Appraised to 38. 10. 9. & 3 Negroes, a Man Appraised at 25£. a Woman Appraised at 25£. and a Child at 5£. In all 55£. So the whole amount of the Inventory was 93. 10. 9.

Goddin the Intestate in his Lifetime was Indebted to [189] Keiling £. 7. 1. 3. Stg. Stannup marries Goddins Widow and Keiling June 14. 1711. obtains a Judgm't against them for his Debt & Costs. 10th June an Ex'on issued and by Virtue thereof that Negro Woman and her Child Appraised at 30£. were taken to Satisfy the Judgment, Stannup then pays the Money and takes the two Negroes again thinking the Property by these methods was legally vested in him

In January 1715. he Exhibits an Acco't of the Intestates Estate wherein he Charges for Debts paid 27. 18. 11¼, and 5 pr Ct. for his own Trouble 1. 8. 0. and giving Credit for the amount of the Inventory makes a Ball. of 64. 3. 9¼. due to be divided between the Widow and the Plt. which is 9£. and upwards more than the value of the 3 Negroes

Stannup disposes of the Negro Woman and her Children as his own, and dies, leaving his Wife his Ex'r She afterwards married the Deft. Morris. The Negro Woman has now seven Children, She & the Children are in the Possession of the Deft. Morris, and the others are in the Possession of the Deft. Allen being given to him as a Portion with Stannups Daughter

All this matter appears by the Bill and the Answers of the Several Defend'ts And the End of the Bill is, that the Plt. who is the Son and Heir of Goddin the Intestate may be relieved ag't the Defts. Morris & Allen to recover the Negroes in their possession

The Bill Charges a Combination and contrivance between Stan'p and Keiling to Serve the Execution upon these two Negroes in Order to Vest the property of them in Stannup, But Keiling in his Answer denys it, So we have nothing to say ag't him, It is certainly Lawful for a Creditor to Sue for his Debt and to serve an Execon. upon what part of his Deb'rs Estate he pleases

But I think this Scheme of Stannups to vest the property of these Negroes in himself is a very vain and fruitless one and not to be supported either by the Rules of Law or Equity

And the short Question upon the matter is Whether when a Man dies and leaves a Personal Estate sufficient to pay all his Debts with an Overplus and Several Negroes, And a Cred'r having a Judgment Serves an Execon. upon one or more of the Negroes, and the Ex'or redeems those Negroes by paying a Sum of money which is less than the value of one of the Negroes, the property shall be vested in him or remain in the Heir as it was before

Now in the Determining this Question it must be observed [190] If the Sum paid for the Redemption of the Negro in such a Case be less than the value there can be no difference between pay'g a Shilling or 10£. Equity must make the same Judgmt. in both Cases Then observe the Inconveniences of Establishing such a Practice among Exors.

A Man may die indebted to several Persons Several small Sums and tho' he leaves sufficient Personal Estate to pay them, his Ex'ors may oblige these Cred'rs to sue for their Debts Then they shall have a Judgm't, An Ex'on follows every Judgm't. They are served upon several Negroes Then the Ex'ors will pay the Money and the Negroes become his own.

If this may be done, the Policy of the Law of this Country in preserving Slaves for the Benefit of Heirs will be in a great measure frustrated, And a Door will be opened to great fraud, and Orphans Exposed to the Cunning and Contrivance of Exors. & Adm'rs

But I conceive this cannot be, but the property of these Negroes will still remain in the Heir, notwithstanding such a Contrivance And when Mr. Stannup in this Case redeemed the two Negroes which were Appraised at 30£. by the paym't of 7£. which was not a fourth part of the value, he did nothing but his Duty and he had Sufficient of the Personal Estate in his Hands to reimburse the Money, and he must take it out of that and not charge the Negroes

Personal Estate is in its own nature liable in the first place for the payment of Debts and when the real Estate is charged with Debts and is applied according If there be any Personal Estate the Heir shall be reimbursed out of it, this is an Established Rule in the Court of Chancery So are many Preced'ts Armitage & Metcalf 1. Cha. Ca. 74. Cornish & Mew *ib.* 271. L'd Gray & Lady Gray 2. Cha. Cases 297. *ib.* 5. Popley & Popley *ib'd* 84. 1. Vern. 36. White & White 2. Vern. 43. Lovel & Lancaster *ib'd* 183. Cutler & Coxeter *ib'd* 302.

In this Court it hath been several times Adjudged that if an Exor having sufficient Personal Estate in his Hands sell Neg'es for the paym't of Debts, such Sale is void, and the Heir may recover the Negroes. It was so in Drummond's Case

The late Law for Explaining the Act making Negroes Real Estate Ratifys those Judgm't, and expressly declares that Ex'ors shall not Sell Negroes till the Personal Estate is exhausted Then according to the Cases in the Court of Chancery it is very Clear that the Heir at least must [191] be reimbursed out of the Personal Estate when his Negroes are Legally taken to paym't of Debts, and *bona fide* Sold This would be no Question

And by the Judgm'ts and the Law here, where Negroes are Sold for the payment of Debts by an Ex'or who has sufficient Assets besides, no prop'ty passes from the Heir, but he may recover them wherever he finds 'em

But here the Execution will be objected, and it may be say'd that the property of the two Negroes in this Case was Transferred to the Cred'rs and passed again from him to Stannup upon payment of the Money

Now as to the Execution, in such Cases as these it must be Generally Admitted, that when the Negroes of a Dead Man are taken and Sold to satisfy a Judgment such a Sale must be good, altho' there be other Assets; And the Heir must in that Case resort to the Personal Estate for Satisfaction. Otherwise the buying of Negroes at such Sales and buyers might be too much discouraged; Yet I think an Ex'or wou'd be to blame to force the Cred'rs to that Extremity when he might raise Money out of the Personal Estate to save the Negroes, and it is certainly the Duty of Exors. to dispose of the p'rsonal Estates in the first place and apply it to the paym't of Debts so far as it will go

But that is not the present Case, Here was no property altered by this Ex'on, for as the Law was then the property vested in the Cred'rs after Appraisn't and paying the Overplus, It appears that nothing of this was done but the Negroes were delivered up back to Mr. Stannup upon his Satisfying the Judgment And if no property vested in Keiling none can be Claimed under him, then the Circumstance of the Exon makes no difference and nothing will remain to transfer the property to Stannup but paying the Money which can avail Nothing, But that is not the Present Case If the property had passed when it returned again to the Exor. for so Stannup is to be considered in this Case, he had it in the same right he had before, He was as a Trustee for the Plt. who was an Infant, He was bound in Conscience to Act for his Benefit and not for his own, And so his Act of redeeming the Negroes must have been Construed if he had done nothing to shew a Contrary Intent

He paid 7£. for what was worth 30£. and it was no Disadvantage to him having enough to make him Satisfaction if that gave him a right to the Negroes The Heir has lost 6 Negroes and he has gained so much very good Interest if he had paid the 7£. out [192] of his own Pocket, but no Court of Equity will give a Sanction to such a Practice So it is Submitted

And the Court Decreed Accordingly, That Stannup had gained no property in the Negroes, but the same, notwithstanding the payment of the Money remained in the Plt. And therefore Decreed that the Defts. shou'd deliver to him the several Negroes in their possession

LIGHTFOOT *vs* LIGHTFOOT. *In Chan'ry Fr Deft.*

The Case.

Francis Lightfoot the Plts. Father was possessed of a great Estate, in Lands, Neg'rs, Goods & Chattels, and had agreed with Perry for the purchase of a Tract of Land upon Nottoway River, and made his Will Whereby among the other Legacies he gives the Deft. a Negro, he giving another in lieu of him to his Heirs, and to his Daughter 1000£. Sterling to be placed out at Interest till she shou'd be of age or be Married, and disposes of the residue of his Estate in these words "All the Remainder of my Estate both Real and Personal wheresoever lying or being I give and Bequeath to my dearly beloved Son Francis Lightfoot and the Heirs Males of his Body lawfully begotten, But in Case my s'd Son dies with't such Male Issue or there be any failure thereafter in the Male line, then I give all my Estate Real and Personal to my well beloved Brother Philip Lightfoot (the Deft.) and his Heirs forever he or they paying to the Daughters of my s'd Son, or in Case there be none such, to my Daughter Elizabeth 2500£. Current money money of Virginia in full Compensation of the same." And appoints this Brother the Deft. and Mr. Benjamin Harrison his Ex'ors. & dies leaving only two Children the Son and Daughter mentioned in the Will. The Ex'ors. proved the Will & took upon them the Exec'on of it Mr. Perrys Attorney requires them to perform the Agreement for the purchase of the Nottoway Land, They agree to do it & Submit the Settling of the Conveyance, so as the Land might pass According to the Will to him as their Council, And the Land was Conveyed accordingly to the Deft. in fee. He declaring at the time of Executing the Deeds that he had it in Trust for his Nephew and the Heirs Male of his Body and the Purchase money was paid out of the Testor's. Estate

The Circumstances of the Estate were such, that there was not Ready money sufficient to place out the 1000£. Legacy to the Daughter The Son in May 1730 about 2 Years and five Months after the death [193] of the Father dies in his Childhood The Deft. then ent'd upon the Estate in his own Right Claiming both the Real and Personal by his Brothers Will But before the Sons death Such part of the Personal Estate as might be the

¹S. C. in W. G's Barradall & not the same report. [Note by W. G.]

worse for keeping was sold by the Deft. and the other Exor. and what was useful to the Heirs Estate was preserved in Specie, and at the time of the Sons death neither the Ballance of the Personal Estate which had been sold, nor the Profits were sufficient to pay the 1000£. Legacy But the Deft. being then chargeable with it consulted the other Exor. who was likewise joint Guardian with him of the Plt. about placing out the 1000£. at Interest, And writ to his Merchant in London to Inform him in what fund it might be put with the best Security and most to the Plts. Advantage But Mr. Harrison wou'd determine nothing positively about it, only desired the Deft. himself to keep it at Interest which he Always refused

The Bill requires the Deft. to Account for the Personal Estate and the Profits of the Lands and Negroes, to Convey the Nottoway Land to the Plt. to place out the 1000£. and 2500£. at Interest for her Benefit and to deliver her a Negro in lieu of the Negro given to the Deft.

These are the material Demands of the Bill, There are other Things likewise demanded, which appear by the Defts. Answer to be without Grounds

The Deft. submits to the Decree of the Court as to the placing out these two Sums of Money at Interest, being very willing it sho'd be disposed of as shall be most for the Plts. Advantage so as he may be Indemnified But as to the Profits he insists that they were chargeable with the paym't of the 1000£. legacy and ought to be applyed accordingly And besides to that part of the Bill which requires the Deft. to Account for the Personal Estate and to deliver the Negro, the Deft. demurs, it appearing by the Plt's. own Shewing that she hath no right to the same

The most important Question is upon the Plts. right to the Personal Estate which she Claims (upon a mistaken Notion I suppose of her Counsel) upon these Grounds; That by her Fathers Will it was vested in the Son, and that the Rem'r Limited to the Deft. is void, as being ag't the Rules of Law, notwithstanding the words of the Will and the Testors. Intent is as clear and strong as possible, That the Deft. shou'd have his p'rsonal Estate upon the Contingency of his Son's dying & leaving no Male Issue But if this Rem'r of the Personal Estate in the manner it is Limited must be held to be a good Rem'r by a liberal Construction that all Courts do in these Days make Men's Wills that they. may rather be [194] performed

than totally disappointed or rendered useless in the smallest matter.

There can be no dispute in this Case about the Construction of the words of this Will or what he intended by them But the Rem'r was designed clearly to take place in the Deft. upon two Contingencies, either if the Son died leaving no male Issue at his death or when in any future time the male line of his Family shou'd be Extinct

For the words of the Will, (If my Son dies without such Issue Male) must in this Case be Construed, If he die leaving no Issue at his death, because of the Subsequent words, (or there may be any failure thereafter in the male line)

And indeed dying with't Issue in Common Parlance and According to Vulgar Acceptation is when a Man has no Issue living at the time of his death, tho' I admit in the Legal Acceptation when there are no words that shew a contrary Intent, these words are understood of a future time, when the remotest posterity shall happen to die without Issue, But here it is Otherwise, for two distinct Sentences in a Will must not be Construed to signify the same thing for then you render one of them useless, which must not be if it may be avoided

Then the Will must be taken as if it had been thus expressed "I give my Son my Personal Estate, but if he die leaving no Issue at his Death, I give it then to my Brother, or if he leave Issue male and the Male line fail at anytime, In that Case likewise I leave it to my Brother

Now I agree that if the first Contingency had not happened but the Son had died leaving Issue Male, upon the failure of the male line afterwards, this Rem'r cou'd not take effect, because the Expect'cy wou'd be too remote, and the Law won't allow the Rem'r of a Chattle to be good unless it may of necessity vest in a few years as upon the Death of one Person or more in being But this will not be a Reason why the Rem'r shou'd not take place when the first Contingency had its Completion upon the Death of the Son, which might & did happen in a very short time Therefore if any Rem'r can be of a Chattle this must be good I suppose the stale distinction in some of the old Law Books between the Devise of a Chattle with Rem'r and the Devise of the Life of a Chattle with Rem'r will not be revived since it has been Exploded lately upon a Solemn Argum't between Edmunds and Hughes (Ante)

But if it shou'd The Cases which ruled the Judgm't in that Case must produce the same Opinion in this Nels. 174. 2. Vern. 245. 331. L'd Nott. Rep. 116. which clearly prove that there is no difference between the two Cases

[195] Then it will not be denied that a Rem'r of a Chattel limited upon a Contingency that may happen in a few years is good

Vide the Case of Chichester and Burges (before) So are the Cases Pawlet and Dogget. 2. Vern. 86. and Martin and Long *ib.* 251. where a Rem'r of a Chattel upon the Contingency of dying before 21. was good But the Case full to our purpose is the Case of Pinbury and Elkin 1. Vern. 758 and 776. Where one Devised his Personal Estate to his Wife Provided if she died with't Issue, then 80 £ . shou'd remain to his Bro'r after her decease The Lord Chancellor Macclesfield was of Opinion, the words (after her decease) determined the meaning of the other words (If she died with't Issue) to Intend, if she had no Issue living at the time of her death, which if they had stood Single must have been taken in the Legal Acceptation and Decreed the Rem'r good

So here the words (or in Case of failure thereafter) must have the same Effect upon the former words So is the Case of Nichols and Hooper 2. Vern. 686. Then clearly this Remainder of the Personal Estate must be good And so the Deft. has a good right to it, Yet the Case of the Att'o Gen'l on behalf of the Gold Smith's Company Fitzgib. 314. is full against this Argument

Then as to the Negro that is demanded I cannot see any difference between that and the rest of the Negroes which the Plt. pretends no right to. It is given to the Heir at Law with a Rem'r to the Deft. in Case of an Accid't that has happened it must be Considered as his Gift and must Consequently be Subject to his Will as well as the rest of his Estate

And as to the Profits the matter insisted on in the Answer I Conceive to be suff't for with't doubt the Legacy of a 1000 £ . was a Debt upon the Residuary Estate which was given to the Son So that Allowing the Profits to be the Sons Estate and no ways affected by the Fathers Will it shall be applyed to discharge the Son's Debt, So I think this Legacy is to be Considered Thus far I have Answered the Plt's. right in point of Law, in these particulars But if I shou'd admit her to be well Intitled in Strictness of Law, and so all regard to the Will and Intent of her Father who has made so handsome a provision for

her must be out of the Question I Conceive we have the clearest Case in the World ag't her and that upon some other very significant words in the Will

“ In Case of my Son's dying without Issue then I give my s'd
“ Estate Real and Personal to my Brother and his Heirs, he or
“ they paying my Daughter 2500£. in full Compensation of the
“ same.

Now surely these words (in full Compensation for the same are very clear and have no Equivocal meaning, they are Capable of being [196] but in one Sense which is, That if such an Accident shou'd befall the Son the Daughter shou'd have 1000£. Sterl. and 2500£. Current Money and demand nothing more of his Estate, which he declares shou'd pass intire as it was to his Brother, I think in as express words as need to be used for such a Purpose

And there is nothing unkind or unreasonable in this a very ample Portion is provided for the Daughter So as to make her a Suitable match to any Estate in the Colony, on the one Hand & on the other he has pursued the Wisdom and Policy of the World in Supporting his Name and the Male line of his Family, So that here is a very wise and just Will and it were to be hoped that if the Plt. were of Years of Discretion she wou'd have so much Piety tow'ds her Father's memory as to desire his Will might take place in its full Extent and not to disappoint any part of it

The Testors. Intention in this Case is so very Apparent that no Question or difficulty can possibly arise concerning it But say they on the other side the Rules of Law will not Allow a Man to Dispose of his Estate in this manner Therefore he will set aside the Rem'r Yet we will have the 2500£. for a Man may certainly give his Daughter a Legacy if he leaves suff't to pay it, as the Testor. here has, But surely this is no reasonable way of arguing in a Court of Equity, The Deft. is bound to pay this Sum of Money in Consideration of his having all the Estate both Real & Personal So that he is no more than a Purchasor, tho' perhaps he has a very good Bargain, And if he is deprived of the Personal Estate how is he Intitled to the 2500£. She must have it upon the Terms of the Will, or not at all, if she has the p'rsonal Estate she must lose the money which I fancy will be no Advantage to her Therefore this Bill is the more Extraordinary on that Account, It seeks to set aside and destroy

the Will in one part and to receive a benefit from it in another, which is unnatural and no ways Consistent with the Rules of Equity. So I think upon the whole matter there can be no doubt but if the Plt. will demand the 2500£. she must Accept it upon the Terms of the Will, The Will is clear that she must give up all pretentions to her Father's Estate, for the Deft. must have that to enable him to pay the money, And of this Opinion I am persuaded the Court will be upon the Reason of the [197] thing with't any authority or Precedent, yet I will mention one Case very like this

The Case of Lady Hearne and Frederic Hearne reported 2. Vern. 555. which was thus Sir Joseph Hearne upon his Marriage agreed by Articles That his Wife, over and above one third part of his Personal Estate shou'd if she Survived him have 800£ by the in money and the furniture of a Chamber and her Jewells And that notwithstanding any thing in the Articles she shou'd not be debarred of any thing S'r Joseph shou'd give her by his Will. S'r Joseph makes his Will and disposed of his Estate and among other Things gave his Wife 1000£. The Lady demanded the 800£ by the Articles and the 1000£. But the Lord Chief Justice declared she must either abide by the Articles and renounce the Will, For altho' the 1000£. devised by the Will is not mentioned to be in lieu of what is given by the Articles, yet the Will reports a Disposition of the whole Estate and therefore implies a Condition that she must accept what is there given her in satisfaction of her demands And if she shou'd take the benefit of the Will she must suffer the Will to be performed throughout L. p. p. Lord Semors, Laurence and Laurence 2. Vern. 365. and the Case of Ney and Mordaunt 2. Vern. 580. full to the same purpose

Our Case is still stronger than this Because the Testators words are Express that the 2500£. should be paid in lieu and full satisfaction of all his Estate of every kind. But then it may be objected that the Profits accrued after the Testators death and can't be reckoned as part of his Estate and therefore can't be claimed by the Deft. by any words in the Will

And this indeed is all that can be claimed with any Colour of Reason in behalf of the Plt. as to these matters in dispute For supposing the Son had lived to be of age and after several years possession had raised a Considerable Sum of money out of the Profits might not he have had a Power over it and disposed

of it as he pleased, Or if he had died Intestate wou'd not the Law have given it to his Sister, and then where is the difference between that Case and this

Indeed I cannot withstand this Objection if that were the Case But my Answer is that there are no profits swallowed up in the payment of the 1000£. Legacy And I must enforce that Argum't a little farther

Here all the Personal Estate except what was necessary to be preserved in Specie for the Benefit of the Heir and his Estate has been Disposed of, and the Profits were designed by the Ex'ors. & Guardians to Supply the deficiency of the Personal Estate that has been sold and have actually applyed by both Ex'ors. to the raising money for the Legacy in the life time of the Heir which was certainly a publick Application and cannot now be altered upon the event of his dying as being so much actually vested in the Plt.

[198] And besides it is plain that the 2500£. to be paid by the Deft. was intend'd by the Father in lieu and full Satisfaction of everything the Plt. might Claim from his Estate, and these profits do arise from the Estate and cou'd not be designed by the Father to be Accounted for to the Plt. in Case of the Accident of his Sons death If such Intent may be Collected from the Will, then the Plt. must be barred of them by the 2500£. legacy or at least the pr.sonal Estate saved by the Profits remains Subject to the Contingency in the Will Then I understand the next thing to be Insisted on is Interest for the 1000£. and 2500£. there is no pretence to demand Interest for that and there are no words in the Will to charge the residuary Estate with the paym't of Interest for the 1000£. before it was raised But as the Ex'ors. are Ordered to place it at Interest it is implied that the money must be raised from the Estate before that cou'd be done, Otherwise they must have paid so much of their own money

Now we Submitted in beginning to the Decree of the Court about placing out both Sums in such of the Government Securities in England as the Court shou'd direct, and this we hope is all that cou'd be reasonably required of us, and the Court made an Order about it Accordingly as to the Nottoway Lands with't doubt they shall pass with the other Lands by the Will

A Purchase with't Conveyance is an Equitable Int. and is as well Devisable as Real Estates, the Vendor being a Trustee

for the Purchasor 2. Vern. 680. 1. Cha. Ca. 39. So money agreed to be laid out in Lands shall pass as Land. 1. Vern. 471.

But if it were Otherwise the Legal Estate by Conveyance is vested in the Deft. Subject to a Trust which is now gone and to set aside this Conveyance and create a new Trust cannot be by the Rules of Equity as this is Circumstanced, Because by the Compleating this Purchase the personal Estate which is now vested clearly in the Deft. is now lessened and therefore he ought to have the Benefit of the Purchase As where a Guardian of an Infant having a Consid'ble Sum of Money in his Hands raised out of the Infants Estate lays it out in a Purchase for the Infant. The Infant dies under age, this Land shall not go to the Infants heir, but shall be looked upon as a Personal Estate, because the Personal Estate was lessened by the Purchase And it is a Maxim in Equity that he shall have Satisfaction which sustains the loss Vern. 403. 435. Cha. Cases. 377.

So upon the whole matter I conceive that the Tes'tors Will must [199] be performed throughout, Otherwise the Plt. will have no right to the 2500£. The Tes'tors. Will is clear that the Deft. shou'd have all his Real & Pr'sonal Estate which Includes every thing a Man can dispose of, no Question can remain but about the Profits He might have disposed of them by proper words and they are charged we hope with the 1000£. if not, the 2500£. must be Construed a Composition for them, as well as every thing else

Then all the adversary part of the Plts. Bill must be dismisst and what relates to the paying and placing out the Money at Interest we cou'd do nothing in it safely with't the Decree of this Court and to the Thousand pound Legacy the Deft. is only a Trustee And as a Trustee he shall not be Answerable for Interest, Unless he had been supinely Negligent or guilty of a wilful default in placing it out at Interest Vern. 144. And as to the 2500£. there cou'd be no payment to the Plt. being an Infant. The Court has taken the matter upon them and made an Order in it

So upon the whole it is Submitted

Cases cited against us. Whitmore's Case Pollexf. 37. of several Limitations of a Personal thing and only one of them good. Obj. That the Negro Bob was not in the same Circumstances as the other Estate

But the whole Court were of Opinion with the Deft.

¹MEEKINS vs BURWELL. *Ejectm't. Fr Deft. (Vide Ante.*

The Case.

Thomas Meekins was Seized in fee of a Tract of Land whereof the Lands in Question are parcel and having Issue 3 Sons Thomas, William, Roger and a Daughter Mary, by his Will bearing Date the 7th February 1669. Devised one parcel of Land to his Son Thomas in fee with a Legacy, another Parcel to W'm in fee with a Legacy, another Parcel to Roger in fee with a Legacy and gives his Daughter a Legacy Then follows this Clause. "If it shall happen that any of my s'd Children die "with't Issue, then that Share to be equally divided among "those that Survive, but if all my Children die with't Issue "then my Lands shall fall to my Heirs in England." The Testator died, Thomas, William and Roger Entered into their several parts William died with't Issue before the Year 1682 Thomas entered into his part and by Feoffment dated 7. 9ber 1682, Conveyed it to Humphry Browning who entered, William Brown as Guardian to Roger Entered upon him Browning brought Ejectm't & by Judgm't of the General Court 28. Sep'r 1683. recovered The Court adjudging that Tho's had a fee in W'ms part. 1. Feb'ry 1698. Browning Enfeoffs Burwell and 4 & 5. April 1710. by lease and Release Roger likewise Conveyed his part to Burwell the Defts. Grand-father under whom he Claims Thomas Meekins the eldest Son died March 2, 1721, leaving Issue the Lessor of the [200] Plt. his Son and Heir and Roger Meekins died 6th March 1723, with't Issue

There was an Ejectm't formerly brought by this Lessor and the Son and Heir of the Daughter one Vadin and upon a Special Verd't in that Cause this Court in October 1729, adjudged that the three Sons had several Estates tail in their Lands And that Thos. and Roger had an Estate Tail in William's part and that the Daughter took nothing and for that reason the Plt. cou'd not recover having made Vadin one of the Lessors who had no Title. But as to a moiety of Williams part, it was held that Meekins's was barred by the Stat. of Limitations So now this Ejectm't is brought for a moiety of William's part, and all of Rogers part upon the Opinion of the Majority of the Court given in the former Cause

It was strongly insisted in that Argument that the Recovery by Browning in this Court in the Year 1683. being still in force and not reversed gave the Deft. a Title, however this Will might be Construed, but that being overruled then I shall not touch upon that point but leave it to be Argued by the Gentleman who is concerned on the same side with me, whose Opinion I know is That that Judgm't gives the Deft. a Title, tho' my Sentiments of the matter are otherwise, but the Question I shall Consider will only be Whether the three Sons of the Testator had several Estates Tail by this Will in the Lands Devised to them. In the first part of the Will all the Lands are given to the Sons and their Heirs for ever which with't doubt makes a Fee Simple But then this Clause "And if any of my Children "die with't Issue that Share to be equally divided between the "Survivors, and if all my Children die without Issue then my "Lands to go to my Heirs in England."

Now if the first part of the Clause can be construed to Relate to the Land the Estate of the Sons must be clearly a Fee Tail, But I conceive no such Construction can Reasonably be made, because the Tes'tor in the Former part of his Will besides the Land had given to each of his Sons a part of his Personal Estate, and had given his Daughter a part of his Personal Estate with't any Lands, Then immediately follows this Clause, and the words (if any of my Children) without doubt will Extend to the Daughters as well as the Sons, And therefore the Tes'tor must intend that if the Daughter died without Issue her Legacy shou'd be divided among the Brothers. He must likewise intend that something shou'd Survive to the Daughter upon the death of any of the Sons, but the Court in the last Cause adjudged that the Daughter took nothing [201] in the Land And then consequently by this part of the Clause the Surviving Sons cou'd take nothing in the Land of William. So that these first words can have no Influence upon the Estates given to the Sons in the former part of the Will And this is clearer from the Subsequent words (if all my Children die without Issue, then my Lands to go to my Heirs in England) from whence it must be Implied that the word (share) before was not intended to affect the Lands for the express mention of Lands here must by all the rules of Construction Exclude them in the words before

And it will be no Objection to this Construction, to say, That if the Tes'tor's Intent was to Limit a Rem'r of the Personal

Estate to the Surviv.g Children upon the death of any of them with't Issue such Intent cou'd not take effect by the Rules of Law And so it wou'd be Interpreting a Man's Words in Order to render them useless, This I say will be no Objection, if it be a Reasonable and necessary Construction, for neither Ignorant People nor those that are more knowing are so well Acquainted with the Rules of Law as to such Remainder can't be Limited

Now to support this Construction by Authority. tho' it it without doubt difficult to bring an Adjudged Case that may be opposite to every Will in the World I think the Case of Ever and Haydon Cro. Eliz'a 476. to the purpose Where a Man was seized of Houses and Lands in Lawton in the County of Oxford, and also of Houses and Lands in Waterford in the County of Hartford and Devised his Houses and Lands in Oxton and also his Lands, Meadows and Pastures in the County of Hartford, And it was Adjudged that the Houses upon the Lands in H. did not pass, because hav'g mentioned the Houses and Lands in Oxton, and only the Lands, Meadows, and Pastures in H. he cou'd not intend to pass the Houses in H. Otherwise he wou'd have mentioned Houses in both places, and besides the particular Devising of his Lands, Meadows and Pastures restrain the general Intendment of the word Lands and excludes Houses

The same Case so Adjudged Owen 74. And the Judgm't was Affirmed upon a Writ of Error in the Exchequer Chamber, for this Reason That having Devised a House in Oxton and Land in H. it cou'd not be Intended that he wou'd pass more than his words express, viz. the Land and not the Houses upon the Land 2. Ander. 123.

There is the very same Reason here that the express mention of Lands in the latter part of the Clause shou'd restrain the general Intendment of the word (Share) in the beginning to exclude the Lands if it might Otherwise Extend to them

Then if this be the natural Construction of the first words [202] We must Encounter the Subseq't words of the Clause "If all my Children die without Issue, then my Lands to go to my Heirs in England And no doubt it will be Argued on the other side that these Words put their Title out of dispute, notwithstanding our Construction of the preceeding Words shou'd take place, But I conceive these words Cannot hurt us

For the Case then will be no more than this "A man having 3 Sons and a Daughter devises Lands to his Sons and to their

Heirs for ever And adds a Clause that if all his Children die without Issue, then his Lands to his next Heirs If these words were in a Deed the Sons with't doubt wou'd have a fee Simple

And a Will shall never be construed to Convey an Estate Otherwise than a Deed will, unless the apparent Intent of the Devisor will Otherwise be frustrate and ineffectual Therefore where in a Deed the words carry a fee simple, and the like words are in a Will, but some farther Intention of the Devisor be expressed which can't take effect with't restraining words which Import a fee Simple to an Estate Tail Such Construction must be made, And this is the Reason why in Construction of Devises to one and his Heirs, and if he die with't Issue, Rem'r to another The first shall be only an Estate Tail that the last may not be frustrated, but the Intent observed & performed. Pollexf. Argum't his Rep. of Maynel & Reads Case 426.

But when this farther Intention is so doubtfully expressed that it cannot be Collected from his words in whom this Rem'r shall vest Then the fee Simple shall stand and not be turned into an Estate Tail, because this is to be done only for the sake of the Rem'r to make that good

Now if in this Case the Testor had had only three Children and Devised his Lands to them and their Heirs with such a Clause as is here they wou'd have several Estates Tail with cross Remainders to one another, and if they had all died with't Issue, then the Heirs in England must have come in, But having four Children & Land to 3 of them and their Heirs, and then saying, if all my Children die without Issue, then to my Heirs in England, makes an invincible difficulty in the Case

It cannot be so much as Conjectured from the words, how or in what Order the Surviving Children shall take upon the death of one or more of them with't Issue; and no Cross remainder can be Implied He might intend that upon the death of one Son with't Issue [203] the Land shou'd be divided among the Surviving Sons, exclusive of the Daughter or equally between the Sons and Daughter, Or he might intend his Daughter to Succeed after all his Sons were dead But which of these he intended can't possibly be discovered. For which Reason this Clause must be void

An Authority for this point is the Case of Hanchet & Thelwal 3. Mod. 104. and Skinner 266. Reported by the Names of Price and Warren Where the Tes'tor. had two Sons and 4 Daughters

and Devised Lands to One Son for life Rem'r to his 4 Daughters share and share alike. And if all his Sons and Daughters died without Issue, then to his Sister and her Heirs. The Court held it uncertain in what Order the Estate shou'd go, there being no Appointm't who shou'd have the part of any of the Daughters dying with't Issue, therefore the Daughters had no Estate Tail, but the words (If all my Sons and Daughters die without Issue were void

For the Wills are to be favoured in Construction as far as may be Yet where they are so uncertain that the Intention can't be Collected they ought to fall, Our Case is the same, as to the last part of the Clause, and if one the other side it shou'd be laboured to Construe the first part of the Clause to extend to the Lands, there will be the same difficulty there, for it will be impossible to know whether the Tes'tor intended to exclude the Daughter in the first Rem'r or not, the words will certainly take her in, And yet the Court at the last Argument held she took nothing, And where one part of a Mans Will is Clear and Express, as here, in the Devise to the 3 Sons, and the other part is so Doubtful and uncertain that it may be taken one way or other it is most Reasonable, and the Case before cited proves it to be Lawful to let the express Devise take place and to shew no regard to that which can't be clearly understood

But then it will be Objected that the Tes'tor plainly intended to keep his Land in his Family as long as any of them was remaining And here we are labouring to frustrate that Estate

Ans'r The Intent is clearly so, but that Intent can't be performed for want of knowing how the family were to Succeed in the Inheritance and then it is the same thing as if no part of his Intent cou'd be discovered, However it must be Admitted of all sides that this is no clear Will, It was Adjudged in this Court near 50 Years ago that the Sons had a fee Simple That Judgm't has remained in peace till within these four Years, We have purchas'd under it, and thought we had the same Security that any Body can have under any Judgment of this Day, Making a different Construction of the Will now will be unsettling a long possession that we had of Williams part, Destroying a Title which is founded on the Judgm't of the Supreme Court of a Country and the Consequences of such a Preced't ought to be considered.

[204] Upon the whole we hope we have made it clear, perhaps upon a Nicer debate of the matter That the Court in 1683, gave a right Judgment And so we Submit it and pray the Judgm't for the Defendant

But if the Court shall be of Opinion that by the first part of the Clause the 3 Sons had Estates tail in the several parcels of Land Devised to them & that the Daughter took nothing upon the death of William, which was the Opinion upon the last Argument, Yet the Deft. must have a good Title to William's part, Because the words (if any of my Children die without Issue that Share to be equally divided among those that Survive) will only pass an Estate for Life in Williams part to Tho's and Roger So is the Case of Middleton and Swain Skinner 339. and Beviston and Hussey Skinner 563. Then the Reversion in fee being in Thomas drowned his Estate for Life and the fee passed by the Conveyance to Browning as well of his Moiety as Rogers

But as to Rogers we have a Title by the Act of Limitation accord'g to the former Judgment Now it cannot be Argued from the Subseq't Words that this Remainder shall be by them turned into an Estate Tail, because upon the Authority of the Case before cited these words are Absolutely void if the Daughter took nothing in Rem'r which is now Admitted on both sides

But the Court gave Judgm't for the Plt. That the Sons had several Estates Tail with Cross remainder According to the Opinion upon the former Argument

Of this Opinion were Mr. Commissary, Byrd, Digges, Robinson, Dandridge & Custis, Ag't it Grymes, Randolph, The Gov'r Silent.

ARMISTEAD *vs* SWINEY & HIS WIFE Ex'ts of N. CURLE. *In Chanc.*

The Case.

Nicholas Curle being possessed of a considerable Estate in Slaves, Goods, Chattels, ready money and outstanding Debts, made his last Will and Testament whereby he gave several Legacies to his Wife & Children And appointed her Executrix during her Widowhood, but if she married, then Geo. Walker, John Curle, and Harry Jenkins shou'd be joint Ex'ors. with her, After the Tes'tors. death she proved the Will and George Walker, Edmond Keary, Joshua Curle and John Smith became her Securities for her faithful Administration She exhibited an

Inventory and afterwards intermarried with James Rickets which made her Securities uneasy, So they Petitioned the County Court of Eliz'a City to be discharged Whereupon the Plt. together with James Rickets and others [205] became bound to the Justices of that Court in the Penalty of 2000*£*. Stg. upon Condition that Rickets Wife shou'd faithfully Administer her former Husbands Estate (In the words of the Condition of the former Bond) and the former Securities were discharged, After this Rickets wasted Curles Estate and died not leaving sufficient to Satisfy the Legacies given by Curle to his Children, His Wife is Adm'x of his Estate and married a third Husband, the Deft. Swiney, and upon this, Swiney to secure himself and his Wife as he Imagined, stired up a prosecution ag't the Plt. upon the Bond he entered into for Adm'on. in Order to compel him to satisfy Curles Legacies, so far as Rickets Estate proved deficient, And after some proceedings upon the Action, and a discovery made that Curles Estate was wasted, and Rickets Assets wou'd not be sufficient to Supply the Deficiency, the Plt. exhibited his Bill against the Defendant And the End of the Bill is to Compel the Deft. Jane to a Settlem't of an Account of her Administration of Curles Estate and Rickets and to oblige her, and her present Husband to Indemnifie the Plaintiff

To which the Deft. Jane answers That the Plt. and the other Securities did become bound as in the Bill is set forth, but they did it out of friendship to Rickets, upon what Inducements she does not know and that she always Expected and understood that they were Answerable for Rickets management and that he wasted Curles Estate and if the Plt. had not with the other become Sureties the Estate wou'd have been taken out of Rickets hands and lodged in the Hands of the former Securities where it might have been secure And as to Rickets Estate she says that 4 of the Negroes are are not to be Accounted his Estate because three of them were Devised to her by Curle and the 4th she purchased in her Widowhood before she married Rickets

The Deft. Swiney Answers, That none of Curles Estate ever came to his Hands Except the Negro before mentioned and that he hath Exhibited an Account of the Adm'on. of Curles Estate, to which he refers. And as to the four Negroes he made them his own by Bargain and Sale Executed by him and his Wife to Samuel Swiney, who Conveyed them back to him, and owns that he caused the Action at Common Law to be Com-

menced ag't the Plt. and insists that neither he or his Wife are liable either in Law or Equity to indemnifie the Plt. There are other matters relating to the Account of Curles and Rickets Estates in both Answers which need not be mentioned, because when the first Question is determined, there must be a Decree for the Defts. to Account, and then all the disputed Articles will come properly before the Court Now upon the Bill and Answer, the Questions are Whether the Deft. Jane Executrix of Curle be liable in Equity to Indemnify the Plt. who became Security at Richards Request for her Administration [206] and if she is not then, Whether the 4 Negroes mentioned in both Ans'rs are not to be Accounted Rickets Estate And I conceive she is bound in Equity to Indemnify the Plt. because she is the principal in the Case and she is without doubt chargeable with all Debts and Legacies of Curl if the Creditors and Legatees think fit to take their remedy ag't her She is admitted herself Executrix and confessed that sufficient of Curles Estate came to her Hands to pay all his Debts & Legacies with an Overplus she married Rickets who wasted Curles Estate, this wasting is to be considered as her own Act being occasioned by her folly in Marrying such a Husband

If a Man takes an Executrix to wife and Waste the Goods it is a Devistavit in the Wife, for it was her folly, to take such a Husband who wou'd make a Devestavit And if she Survive that Husband and marry another they are both liable and if there be a Recovery against them and the Wife dies the Husband still remains Chargeable in respect of the Judgm't against him in his Wife's life But if there be no Recovery in the Life of the Wife, then it's otherwise Fr Curiam Inter Monnson & Bourn Cro. Car. 519. S. P. Is so Adjudged between Eyres and Coward 1. Sid. 337.

The Legatees have not only a remedy against her & her present Husband in Chancery, but they have the same remedy against them upon the Bond she entered into with the first Securities for her Adm'on. for that Bond is still in force as to her tho' the Securities are discharged by the new Secruities.

Then the Deft. Jane still remains chargeable as principal both in Law and Equity & we are liable only as her Sureties in the same manner as the first Securities wou'd have been if they had not been discharged and no otherwise, For our Bond is in the same words as theirs was, that she shou'd faithfully Administer

Curles Estate And it is no ways material in the Case whether we became bound on her Account or out of Friendship to her Husband Rickets. If it was for the Advantage of the Husband to keep this Estate in his Hands it must likewise be for the benefit of the Wife, because their Inter'sts must be the same And the event of this management will make no difference now

Then if it be admitted that she is liable to the Cred'rs & Legatees in the first place which I think can't be denied, it must [207] follow by the rules of Equity, that we who are collaterally bound as her Sureties shou'd resort to her to be saved harmless and there can be no Reason that we shou'd pay the money she owes without Redress because the Creditors and Legatees chuse their remedy ag't us rather than against her, or rather because she and her Husband have had it in their power to stir up this Prosecution against us

If two or three Person become bound jointly and Severally as principals and the Obligee will take his Remedy against one he may Compel the rest to Contribute their proportion towards Indemnifying him

So it is Where several are Sureties and one is Sued Equity will Decree a Contribution against the rest and in all Cases the Securities may resort to the principal for Satisfaction of what they are damnified on his Account And it is a Standing Rule in Equity, That the Person or Thing which is primarily Chargeable shall make satisfaction to the Person or Thing that is Collaterally or Secundarily liable This is apparent in a multitude of Instances in the Chancery Books

The Consequence of the Wifes being liable is that the Husband must be so too Tho' it may be objected to be a very hard Case, but it is of the unhappy Conditions of Matrimony that the Husband must take his Wife with all her Incumbrances

The Case of Gilpin vs Smith and his Wife & Touch 1. Cha. Ca. 80. is clear to this purpose S'r Edward Touch Settled Lands on Trustees after his Death for payment of his Debts and dies leaving the Deft. Touch his Son and Heir, and the Deft. Smith his Widow, She enters. The Trustees did not Act, She marrys one Loyd, and he takes the Profits during his Life, he dies. She Marries Smith, Smith received the Profits till the Heir came of age, The Plt. was a Cred'r of S'r Edward Touch and Exhibited his Bill ag't the Deft. to have his Debt It was Decreed that the Wife was chargeable with the money received by Loyd

her Second Husband it being considered as her on Act and in Consequence of that Smith her last Husband was liable for the wrong done by Loyd, even tho' there was Assets of L'yds in the Hands of the Wife who was Executrix And Smith and his Wife were Decreed to Indemnify the Heir. N B.

But perhaps the Case of Norton and Sprig 1. Vern. 309. may be Objected, It is say'd Fr Cur. Where there is a Bond there is a Lien by Deed and so the 2d. Husband in Case of a Devastavit of the Wife and her Husband is bound, But where there is barely [?] a breach of Trust or Debt by Simple Contract there the Plt. (a Creditor) ought to follow the Estate of the Wife in the Hands of the Ex'or. of the first Husband

[208] And I do Admit, that wou'd be reasonable, But it does not follow that when there is no Estate of the Wife or of the first Husband, that the 2d Husband shall not be Charged, but the contrary is to be inferred from the Case, for the Estate of the Wife can be chargeable no otherwise than her Person is And she is liable in Consequence every Husband she shall marry during their lives must be so to, for it is impossible to have a Decree or Judgment against a Feme Covert alone

Yet without doubt this Case proves that the Estate of the Wife where ever it is, is liable in the first place, Therefore no Question will remain whether the four Negroes mentioned in the Defts. Answer shall be applied towards our relief, be they accounted Rickets Estate or not

But besides I suppose no Man in the world will say Seriously that they were not Rickets Estate, since the Act explaining the Act mak'g Negroes Real Estate which is so express in the matter that nothing can be say'd against it

Therefore we pray a Decree that we may be Indemnified first out of the value of these Negroes so far as they will go. And for the rest ag't the Deft. *Vid.* 1. Rolls. Rep 268. Husband Chargeable with the Devastavit of the Wife before Coverture Fr Coke Cro. Caro. 603. King and Hilson Fr Cur. S. P. 2. Lev. 145. Wife Chargeable with Devastavit of her Husband after his death, Agreed, Cited by Mr. Robertson for the Plt.

On the other side it was Objected by Mr. Hopkins That the Wife it is true is chargeable for a Devastavit to a Cred'r but shall not [?] a legatee. The Cases don't prove that, says he, and that the Plt. is no Cred'r And besides Preced'ts in Equity are of no use

And the Court Decreed that the account of the Deft. Jane's Ad'mon. of the Estate of both her Husbands shou'd be Settled and that she and her present Husband shou'd Indemnify the Plt. for the Ballance.

[209]

¹DOCTOR NICHOLAS & HIS WIFE *vs* LEWIS BURWELL Surviving
Exor. &c. of NATHANIEL BURWELL. *In Chanc'y Fr Deft.*

The Case.

The Testor. being possessed of a great Estate Real and Personal and having four Children made his last Will and Testament which is dated the 20th of August 1721. wherein he divides his Real Estate among his three Sons and gives his Personal Estate after his Wife's share was deducted (which he Said wou'd be $\frac{1}{3}$) and 100£. Stg. to his Daughter, to be divided between his Sons, Then takes notice that his Wife was with Child and makes Provision for it in this manner " I do now hereby Order, Will " and Devise that if such Child be born and do live to the age " of 21. that then if it be a female, there shall be paid to such " female 100£. Stg., and if it be a Male Child, when it comes to " age, I give it 2000£. Stg. and these several Sums or one of " them out of the Bulk of my Estate."

The 21st of August he makes a Codicil giving his Daughter 200£ more and some other small Legacies and Explaining a part of his Will (which has no Relation to this Cause) " After " his Debts and Legacies paid and the Wifes Lawful Share " deducted, he gives all his Money in England and his Personal " Estate to be divided between his 3 Sons.

The Testator died, his Wife was after his Death delivered of a Daughter, who lived but two Months, She afterwards married Doctor Nicholas, And now they Exhibit a Bill ag't the Deft. who is the Surviving Exor. for her Distributive share of this 1000£. Legacy, To which the Deft. has Demurred, And I think upon his State of the Case the Bill ought to be Dismissed, for I take it clearly, that this Legacy vested in the Posthumous Child and Consequently Lapsed upon her death from the most liberal Construction that can be made of the Testators words

His Intent is very Apparent from the whole Scope of the Will,

¹S. C. in W. G.'s. Barradall 3 but not the same report. [Note by W. G.]

There a plain Declaration, that he Intended (in the first part of it) no more to his Wife than what she cou'd Claim by the Law of this Colony, And that the whole residue, after the Legacy to his Daughter and his Debts were paid shou'd be divided between his three Sons. This I say is his clear Intent before he thought of his Wife being with Child When he called that to mind he proceeded in a manner very Suitable to his former design and makes a Provision for the after born Child by words penned with the utmost Caution So as not to prejudice his 3 Sons in Case the after born Child shou'd not live long enough to want the Portion Intended for it His words are " If such " Child be born and live to the age of 21 Years, then shall be " paid to it so much [210] Carefully avoiding any word of giving or vesting the Legacy in Case the Contingency of her living to 21. never happened.

Again, when he comes to Explain his Will the next Day he gives the whole overplus of his Money in England and his Personal Estate to his 3 Sons and there can be no doubt of his Intending the Sons shou'd have the sole Benefit of the Deaths that might happen in his Family When he expressly provides that if his Daughter Elizabeth shou'd die before she came of age or was married that her Legacy shou'd go to the Children or the Survivor of them, So that taking the whole Will in one View it is apparent he never Intended that the latter Clause shou'd make any difference as to the Sons in Case the after born Child shou'd not live to receive its Portion.

Nor can the words be construed in any manner to favour the Plts. Claim without wresting them from the Common and natural meaning, If a Man says " If such a thing, Or when such a Thing happens, I give you so much money, if the thing never happens nothing is given but all is void, And to Construe such a Gift absolute & free from the Condition can't possibly be with't rejecting the greatest part of the Sentence But such a Construction is now laboured & I Suppose will be urged upon the Authority of some Case or other which I never heard of. And indeed there must be something Extraordinary to prevail against Common Sense Or set aside the plain Signification of words I can find no Precedent whereon the Plt. can fix his foundation for this Claim, but all the Books are ag't him

In the Civil Law it is a settled point, That when a Legacy is Conditional it is not due, till the Condition is prformed, So

when a Legacy is given at a time which may not happen, as when he shall Marry, or when he shall attain to such an age, if the Legatee dies before that time his Ex'ors. shall have no benefit of the Legacy.

But if a Legacy be given absolutely and a time be Limited for the payment of it, tho' the Legatee die before, it shall go to his Ex'ors. or Adm'rs Swinb. 462. 463. 464.

This Distinction proceeded from a willingness in the Judges in Civil Law to favour a particular Legatee against the Residuary Legatee who takes away the whole Surplus of the prsonal Estate rather than from the reason of the Thing, for the difference [211] between one Case and the other seems too nice for the generality of Mankind to think on in making their last Wills, or even Conceive, But it has been often said by very Eminent Men in the Common Law, that if that distinction had not ruled the Judges in so many Cases, it had not so much weight in it as to intitle the Ex'or. or Adm'r to the Legacy given in either these manners Because it is most Natural to suppose the Tes'tors. Intent to be, that the Legacy shou'd be sunk for the benefit of the universal Legatee when the particular Legatee died before he was Intitled to receive it rather than Devolve to the Ex'or. or Adm'r of the particular Legatee who may be a mere Stranger to the Testator and might not be designed by him to be a Sharer in his Estate. But the Distinction being Settled among the Judges of the Ecclesiastical Courts and a multitude of Cases being determined Accordingly When the Court of Chancery came to have a Concurrent Jurisdiction with them in these matters, The Lord Chancellors conformed themselves to their Rules that there might be two Jurisdictions determining the same point different ways, which wou'd be very Inconvenient to the Subject. Therefore we see in all the Chancery Books in Cases of Legacies, of which the Ecclesiastical Courts might have Cognizance this distinction observed, and wont obj. of, Excheq'r seems to think there is some probable Colour of Reason in it 241.

In Coleberrys Case. 2 Vent. 342. If Money be bequeathed to one at 21. or at Day of Marriage with Interest and the Legatee dies before it shall go to the Ex'or. because paying of Interest shews his Intent that it shou'd vest im'ediately So if Money be given to one to be paid at the age of 21. Years If the party die before, it shall go to his Ex'ors.

But if it be given to one at his age of 21. and he dies before

the Money is lost? Decreed by Lord Chancellor Nottingham, The same Case is Reported 2 Cha. Rep. 155. and is thus Stated, William Coleberry at his Death gave 2000£. to the Deft. Item to the Daughter of O. Coleberry when she shall attain her age of 21. Years or be married which shou'd first happen 500£. to be paid her with Interest, The Daughter died under age and unmarried. The father Sued and had a Decree for the Legacy and Interest, The Ex'or. brought a Bill of review And the difference was allowed by the Lord Keeper between a Devise to one to be paid at her age of 21. or Marr'e, there it is due tho' she die before, and where it is Devised If, or when she [212] Comes of age, Tho' the directing the payment of Interest made the Difficulty, yet the Lord Keeper once pronounced the Reversal of the Decree

The Case of Smell and Dee, 6. Anna. Salk. 415. is a Stronger Case Where the Tes'tor. gave 100£. a piece to the Children of I. S. at the end of 10 Years after his decease, and some of them died before, The Lord Chancellor Cowper Decreed it a Lapsed Legacy, Because wherever the time is annexed to the Legacy and not to the payment, it shall be so Tho S'r Tho's Powys distinguished very rightly I think that there was a great difference between this Case and a Devise to one at 21. Years of age Because it is a Contingency whether he attain that age; but the Expiration of the 10 Years is inevitable

So that where a Sum of Money is given to be paid at a Certain time it is Construed to be in presenti, Tho' not payable till a future Day, and in that Case, if the Party die before the time it shall go to the Ex'or.

Which the Lord Keeper in the Case of the Lady & Lord Pawlet 1. Vern. 321. 1685. says is a Settled point in the Law But when it is given When a Person comes of age, or if he comes of age it is otherwise Except where Interest is to be paid in the mean time and for that reason it shall vest immediately in that Case As in the Case of Cave and Cave 2. Vern. 508. Stapleton and Chule *ib.* 673. Collins and Metcalf 1. Vern. 462. So Decreed upon the Circumstance of carrying Interest

But when a Legacy is given out of Land at a certain time or to be paid at a certain time and the Legatee dies before the time in either Case the Legacy shall be sunk for the benefit of the Heir Because there the Civil Law has nothing to do This appears in the Case of the Lord and Lady Pawlet above, and is

Decreed in the following Cases, *Yates vs Phettyplace* 2. Vern. 416. The Tes'tor. having Mortgaged his Lands Directs some Leasehold and Personal Estate to be applyed for the payment of his Debts and Legacies And if his Personal Estate shou'd be applied to pay off his Mortgage the same shou'd be kept on foot to make good his Daughters Portion, And thereby Devised to his Daughter 3000£. to be paid at 21. or Marriage with Content

[213] The Daughter died at 6 years old, her Mother Took out Adm'on and sued for the 3000£. But the Lord Keeper Wright Dismissed the Bill and Declared that the Devise being at 21. or Marriage, with Consent, it did not vest, but was Contingent And say'd that a Devise at 21. or to be paid at 21. was the same thing, and the Intention the same and the Distinction between the two Cases taken by Swinburn and Godolphin, he looked upon with't a difference and that the Authorities they Cited did not come up to what they laid down.

1S. P. is so determined by the Master of the Rolls in the Case of Smith and Smith 2. Vern. 92. and the Case of Carter & Bletso *ib.* 617. 1708. Where the Tes'tor directed that his Sons shou'd pay out of his Lands 200£. to his Daughter at the age of 21. and she died before The Lord Chancel'r Cowper Decreed that there was no vesting Clause in the Will, and the Direction to pay at 21. vests nothing and she died before, it never arises

In the Case of Beatman and Roach 11. God. 1. mi. [?] Mod. Cases in Equity 106. The Lord Chancellor says it is a standing Rule of the Court, That where a Legacy is given out of Lands there is no difference Whether it be given at a Certain time or to be paid at a certain time, for in both Cases, if the Party die before, the Legacy is lost, but it is otherwise when the Legacy is to be paid out of the Personal Estate, Yet one wou'd think that as the Testators Intention is to govern in both Cases, the same words ought always to be Construed to express the same Intent

But the reason for it it England seems to be good in respect to the Jurisdictions of the Spiritual Courts and the Court of Chancery Because it wou'd be very Inconvenient to have the same point decided Contrarily in the respective Courts, And that this is the Reason, appears very clearly from the Comment of a late Author in his Abridgment of the Chancery Cases 295.

My observation upon this is, That the reason does not hold

¹[I take S. P. to indicate SAME PRINCIPLE.—W. W. S.]

in this Country to keep up a groundless Distinction, Tho' in the pr'sent Case it is needless to Consider that matter because ither way it is a Clear Case against the Plt. So that it is very hard for me to conceive how the Plts. Case is to be distinguished from all others. If he found his Pretentions upon the word (paid) being made use of, that can avail little if the whole [214] Will be taken together. The Case in Vern. the 2. 617. above mentioned is full answer to every thing that can be say'd upon that word And the Case of Onslow and South Reported in the Abridgment of Cha. Cases. 295. is as strong to the same purpose The Tes'tor. being possessed of a Personal Estate part in Jamaica and part in England made Ex'ors. in Jamaica and in England, and Devised to I. S. now under the Custody of R. D. the Sum of 2000£. at the age of 21. to be paid by my Ex'ors. in England

The Legatee died before 21. and the Lord Chancellor adjudged it a Lapsed Legacy If the Intent and the words of the Testor. and the Rule of Law in the like Case did not so strongly Concur ag't the Plts. Claim it might be worth while to Consider by what rule of Law or Equity he demands a Distributive share of this 1000£. before the time that the Child wou'd have been of age, had it lived which wou'd have happened in the Year 1742. for if it were a vested Legacy he is 9 years too soon with his Suit The Testors Intent is express that Legacy shoud not be paid before the Child attained 21. Years of age, and her Representative cannot have another kind of right than she had That wou'd be Contrary to the rights of representation as it is directly against the words and Intent of the Will

Indeed if a Legacy be given to one to be paid at 21. and if he dies before, to another, and the first Legatee dies before, the first shall have the money immediately because the words of the Will may be so construed But there is no Instance to be given of an Ex'or. or Adm'r recovering a Legacy before the time the Person whom they Represent cou'd have recovered it

1. Vern. 199. Annonimus The Case of Cloberry & Sampson Cited where a Legacy was Devised to a Child, payable when 21. & he dies before, his Adm'r shall have it, but shall wait for it until the Child shou'd have been of age, Decreed by Lord Nottingham and Confirmed in the House of Lords But if the Legacy is payable with Interest the Adm'r shall have it presently *ibid.*

So in the Case of Pupworth and Moor. 2. Vern. 283. Where a

Legacy was Devised to I. S. to be paid at 23. and if he die before to A. B. [215] and I. S. died an Infant A. B. shall have it immediately because the Words and Intent of the Will seem to be so

And the difference is now settled in the Court of Chancery My Lord King Decreed it so in the Case of Landy and William Reported in Abridgm't of Cha. Cases 299. viz. Where such a Legacy is given over the Party shall have it immediately, but the Ex'r or Adm'r must wait till the Legatee wou'd have been of age A'o 1728.

But this Devise being to a Child in *Ventre Sa mere* admits of a farther Distinction, it is not good, but as a Contingent Executory Devise and therefore cannot be construed to be a Debt in presenti (the Child being born two Months after her Fathers death) And then the Condition, if she lives to 21. must of necessity prevent its vesting till the Contingency was past

So upon the whole matter it is clear that the Bill ought to be dismissed And it was Dismissed by

Lee	ag't	Randolph
Tayloe		Custis
Digges		Byrd
		Robinson
		Blair
		The Governor

And Col'o Grymes Declared he was of Opinion with the Majority of the Court

Hopkins's Argument for the Plt. was very Trifling and incoherent Insisting upon Lord Keeper Wrights opinion in the Case of Yates and Phettyplace to be expressly for him, against the plain Sense of his Words All that he say'd worth answering was, That if the Posthumous Child had married under age and had Children & died before she attained the age of 21. It wou'd be very hard to Construe the Children out of the Legacy and the Construction now must be the same But it was Answered there was no necessity for her marrying before 21. and if she had, her Children must have Submitted to the misfortune

[216] SWINEY *vs* DANDRIDGE. *In Chanc. Fr Deft.*

The Case.

Wilson Roccow was possessed of a considerable Estate made his Will dated 26. of August 1713. wherein he gives to his Wife all his Personal Estate after payment of some Legacies *inter alia*. He gives to his God-Son Pasco Curle one hundred pounds at the age of 21. Years and to be brought up in England 2. Years at his Charge

The Wife married the Deft. Pasco Curle died before his age of 21. and the Plt. as his Adm'r demands the Legacy But I think upon the Reasons and Authorities in the Case of Nicholas & Burwell the Bill ought to be Dismissed, But there is a farther Reason from the different penning of the two Wills. The words of the Will connected are, After the payment of some Legacies he gives all to his Wife Then gives this Legacy at a time which never happened which I think clearly shews that the Wife was to have all that the Legatees did not live to receive

And the Bill was Dism't by a great Majority of the Court

JONES *vs* LANGHORN. *Detinue for Negroes Fr Deft.*

The Case.

Mary Godwin being possessed of several Negroes by her Will disposed of them in this manner, " My Will is that after " my Debts and Legacies paid my Daughter Mary Rice shall " have the use of my whole Estate Real and Personal after she " comes to the age of Years, during her natural Life, " And if my Dau'ter shall leave Heirs lawfully begotten of " her Body, that those Heirs shall have my whole Estate &c.

She married Myres, & Myres and she by Deed Mortgaged the Negroes to the Plt. and had Issue 4. Children, and she is now married to the Deft. Langhorn and has four Children by him

The only Question is, Whether a Thing, of which the Wife has only the use may be Disposed of by the Husband, so as to bind the Wife [217] after his Death, For the Deed made by Husband and Wife, is the Deed of the Wife only during Coverture and shall not bind her after the death of her Husband, and I think the Negroes here, of which the Wife had only the use cou'd

¹S. C. in W. G.'s Barradall 15. and printed in Jeff. 37. but not the same report. [Note by W. G.]

only be sold for the Life of the Husband and after his death the Wife shall be restored to the use of them

When the use of a Thing is given to one for a Certain time & after that time to another, it is agreed the first hath only the Occupation and the other the property Bro. Abr. Title. Devise, Lord Hastings Case. Cro. Car. 343. Owen 33.

Now the bare Occupation without a property is a naked Possession which must follow the Person of the Wife, and vests nothing in any of her Husbands longer than the Coverture continues

My Lord Coke upon Littleton 351. Sayes that Marriage is an Absolute Gift of all Chattels Personal in the Wife's own Possession in her own right Except Things in Action and Goods in *Auter droit*, and where the property is not vested in the Wife, And as to Personal Goods, there is a Diversity he says worthy observations between a property & a bare Possession, for if Goods be bailed to the Wife, or if she finds them, this bare possession is not given to the Husband, So in the Case of an Annuity Granted to a Woman for Life, if her Husband Release it, it shall not bind her after his Death, Adjudged between Thompson and Butler Moor 522. And the reason must be, that in that Case the Wife has only a right to Receive the money at the End of every Year if she shou'd live, and this Money when received belongs to the Husband

But a right to receive Money upon the Contingency of a Person living so long is a very uncertain Interest and a mere possibility which is a Thing of that nature that the Husband can have no Power to dispose of for want of an Absolute property *vid. Co. Litt. 352. ut Supra.*

The Case of a Trust for the Wife is much stronger than this and that is held in the Court of Chancery not to vest in the Husband

A Feme Sole Assigned her Term in Trust for herself before Marriage, the Husband alone Mortgages the Term And it was Decreed that such Mortgage was not good and Admitted by the Court to be the Constant practice since 2. Elizabeth's time to set aside & frustrate all [218] Incumbrances and Acts done by the Husband with respect to the Wifes Term. in Trust for her, and that he cou'd neither charge nor Grant it. 1. Cha. Ca. 225. between Doyley and Peifull.

But I agree this point was otherways determined in the House

of Lords in S'r Edward Turners Case 1. Vent. 7. and so ruled Since in many others, tho' against the Reason of the Thing upon the Lords Judgment 1. Vern. 18. 2. Vern. 270.

Yet the Reason given is, That a Trust is an Equitable Interest which the Husband may as well dispose of as a Legal Inter'st

Then there is nothing to intitle the Plt. to these Negroes unless they will derive a Right from the Deed of the Husband & Wife which I think can't bind the Wife after the Husbonds death

The Deed I agree was the Deed of both during Coverture but lost its force when that was determined, unless she had done some Act in her Widowhood to Confirm it

Baron and Feme Acknowledge a Deed to be Inrolled, this does not bind the Feme because she is not Examined by Writ. 10. Co. 43. Such Deed shall be Inrolled only for the Husband, but tho' inrolled for both it bindeth not, 1. Inst. 673.

So if Baron and Feme make a Lease of the Wifes Land rend'g Rent, it is good, during Coverture, but may be avoided by her after the Death of her Husband Cro. Ja. 417. Smallman and Agboran, but if she receives the Rent she confirms it Cro. Ja. 563. Or if her Second Husband before her entrey accepts the Rent the Lease is Confirmed Dyer 159.

But it will be Objected, that the Will including both Lands and Negroes the words will pass an Estate Tail in the Land and therefore the Absolute property in the Negroes must pass Answer The Intent of the Tes'tor. as well as the words give her Expressly no more than for Life See the Will makes a different Provision as to the Lands and Negroes

The word Heirs here shall be a word of Purchase and not of Limitation. Loddington & Keme 1. Salk. 224. S. C. they are a good Description of the Person intended to take Newman vs Barkham 1 Vern. 729. [219] Barradell gave up all the points, but insisted the use vested in the first Husband And

Tayloe & Lightfoot were of that Opinion
Blair, Byrd,
Custis, Randolph &
Lee *Contra*.

So Judgment was given for the Defendant

McCARTY *vs* FITZHUGH. *In Chanc Fr Deft.*

The Case.

The Deft. Married Mackarty's Daughter & became Indebted to him 200£. by Bond, He lived at the time of giving the Bond, in Westmorland, but afterwards removed into Stafford, McCarty by his Will gives all his Debts in Stafford to his Son Dennis and the residue of his Estate to the Complt. and two other Sons and makes the Deft. one of his Ex'ors

The End of the Bill against the Deft. is to have a proportionable part of the Debt as residuary Legatee

The Deft. in his Answer has sworn, That he rec'd 200£. or the value of it in Negroes with his Wife and borrowed this 291£. for which he gave Bond which rested several Years without demand— Upon some Discourse between him and McCarty he told him he wou'd take care that shou'd never rise against him, or Trouble him and Rather than it shou'd he wou'd destroy it immediately, But the Bond was not Cancelled At other times he had Discourses with his Wife and others about this Bond, and tells them that Fitzhugh shall never be Troubled for that money. But say'd. I don't deliver up the Bond yet, it will keep him in Awe &c.

And before the Marriage he told Fitzhugh he loved this Daughter as well as any other of his Daughters and he wou'd give her as much as any of them, and never was Displeased with her, Now in his Will he has given his other Daughters 500£. besides other Legacies and to his Daughter Fitzhugh he gives 2 Negroes of 40£ value Sterling All which will not make up five hundred pounds which the Tes'tor. was Obligated to give and the Question is, Whether upon the Equity of this [220] Case the Plt. ought to be relieved

This Debt is at Law Extinguished by making the Deft. an Ex'or. because it suspended the Action And a Person's Action once Suspended is gone for ever. This appears in a great many Cases, Alston and Andrews, Hutt. 528. Dorchester and Webb. Cro. Car. 372. S'r W'm Jones 345. Salk. 303. Wankford & Wankford

The Tes'tor. was a Lawyer and without doubt knew it wou'd be so and that must be the Occasion of not Cancelling the Bond and the Reason why the Defts. Wife had no more given to her by the Will

But then it will be said, that notwithstanding the Law is so, the Debt still subsists in Equity and shall be recovered by the residuary Legatees upon the Authority of the Case of Philips & Philips 1. Cha. Cases 292. Nicholas Philips made his Will and the Deft. his Ex'or. who was Debtor to him 400£. gave particular Legacies and the residue to the Plt. And the Question was Whether the Debt, being discharged in Law shou'd be accounted as part of the residue, there being no need of it to pay the Debts or Legacies particularly given. A difference was pressed between a Legatee & a Debtor, in which the Debt, tho' discharged shou'd be Assets and the Case of an Ex'or. who is in Effect Devisee of the Debt, but the Lord Chancellor disallowed the difference and Decreed the Debt to the Plt. but was say'd to be contrary to former Precedents

I admit the Equity of this Decree, and there are other Instances where a Bond is extinguished at Law, and shall subsist in Equity particularly in the Case of Acton and Pierce 2 Vern. 480.

And the Reason is from an Implication of the Tes'tors Intent that the Debt shou'd be accounted a part of the residue by the Rules of Equity because of the Express Legacy *vid.* Salk. 303.

Tho it may be objected that we can't be let into this Evidence as it tends to Explain a Will and to change that Construction which by the Rules of Equity might be made upon the face of it

But it is a settled point that proof may be admitted to Shew the Testor's Intent in some Cases when it is only to oust an Implication or Rule of Equity.

[221] As in the Case of Lady Granville and the Dutchess of Branford, 2. Vern. 648. and Batchelor and Seale 2. Vern. 736. So Collateral Proof is Admitted to make certain a Person or Thing, between Hodgson and Caldicot and Hodgson and Fitzh. 2. Vern. 593.

So when a Testor was Indebted to a Person and gave him a Legacy, parol proof was admitted as to his intention, whether the Legacy shou'd go in Satisfaction of the Debt So here 2. Vern. 594.

[End, as I conjecture, of Sir John Randolph's Reports, which begin p. 114 *ante.*]
[Note by W. G.]

I, W. W. Scott, Law Librarian of the State of Virginia, do hereby certify that I have carefully compared the foregoing pages with what is believed to be the original¹ Manuscript Reports by Sir John Randolph, said Manuscript being the property of the Virginia Historical Society, and that the said pages except as otherwise indicated in a few instances where the Original Manuscript was mutilated or illegible are a true copy of the same.

Given under my hand this 12th day of April, 1909.

W W. Scott

As to which see *Ante*, p. 14 *et seq.* R. T. B.

TABLE OF CASES REPORTED BY SIR JOHN RANDOLPH

	Page
ABBOT <i>vs.</i> ABBOT	R115
Action of Trover; plea not guilty; demurrer to plea; judgment in former action dismissing suit, offered in bar; held no bar.	
ALLEN <i>vs.</i> STAFFORD	R48
Action of ejectment; construction of will; whether estate tail; statute of limitations; saving because of infancy; bar of former judgment.	
ARMISTEAD <i>vs.</i> SWINEY	R97
Bill in chancery; construction of will; liability of husband for wife's devastavit of former husband's estate; where it was the second husband who wasted the goods; obligation of sureties on executor's bond.	
BARRETT <i>vs.</i> GIBSON	R70
Action upon the case under statute; liability of ware-house man for act of servant; law as to keeper of a Rolling-House.	
BARRYMAN, etc., <i>vs.</i> COOPER, etc.	R57
Bill in chancery; marriage agreement of second husband to provide for children of the first; legacies by second husband to wife on condition that she discharge the marriage agreement; she accepts legacies and marries third husband; bill to compel performance; so decreed.	
BLACKGROVE <i>vs.</i> ADDISON	R20
Action of ejectment; construction of a will; devise upon condition precedent; effect of notice to purchaser; judgment for defendant.	
BOOTH <i>vs.</i> DUDLEY	R10
Action of ejectment; statute of limitations; rule requiring confession of lease, entry and ouster; effect of a warranty.	
BURGESS ADMX. <i>vs.</i> CHICHESTER ADMR.	R22
Bill in chancery; devise of personal estate for life with remainder over; "first hath only the occupation and the others the property"; a double remainder void.	
CHURCHILL <i>vs.</i> BLACKBURN	R26
Appeal from County Court; information for a fine for violation of statute regulating planting of tobacco; the act construed; judgment reversed.	
CHURCHILL ADS. MACHEN	R30
Appeal from County Court; information for violation of tobacco act; objection for lack of sufficient description; judgment affirmed.	
DENN <i>vs.</i> SMITH	R50
Action of ejectment; plea of statute of limitations; deed of feme covert; acknowledgment on privy examination; effect of repeal of statute of limitations; changes in the statutes; savings in cases of infants and married women.	
DIGGES <i>vs.</i> LILLY	R7
Action for death; form of declaration; plea of <i>non assumpsit</i> .	
EDMONDS <i>vs.</i> HUGHS	R36
Action of detinue; gift of remainder interest in negroes, after estate for life, held good.	

EPPEs vs. REDFORD	R74
<i>Indebitatus assumpsit</i> ; averment and proof of consideration; promise of forbearance.	
FLEMING vs. DIGGS	R78
Action of case; judgment confessed while in custody; discharge by sheriff; whether debtor was "in execution"; liability of sheriff; judgment for defendant.	
FREEMAN <i>et al.</i> ADS. HURST ADMR.	R56
Action of debt; plea covenants performed; case settled by compromise.	
GODDIN vs. MORRIS & UX, etc.	R80
Bill in chancery; suit for an account; complications from various marriages and resulting liabilities; right to increase of negroes; charge of "combination and contrivance"; decree for the plaintiff.	
GOODRIGHT vs. BATSON	R65
Appeal from County Court; construction of a will in action of ejectment; conditional estate; questions of repugnancy; breach of conditions.	
GRAVES vs. BOYD	R45
Bill in chancery for specific execution of contract to convey land; question of "a very hard and unreasonable Bargain"; specific performance decreed.	
HARRISON vs. BLAIR	R54
Action of assumpsit; non assumpsit and statute of limitations; effect of repealed act which was in force when plea pleaded; held act no defence.	
JONES vs. LANGHORN	R109
Action of detinue; gifts of negroes for life; mortgage of negroes by life tenant and husband; death of husband and second marriage; effect of mortgage after first husband's death; words of purchase and limitation; held mortgage did not bind wife after first husband's death; judgment for defendant.	
LAWSON vs. CONNOR	R68
Action of ejectment; grant for life of grantee with right of reversion and subsequent grants; one moiety conveyed to son who died in father's lifetime without issue; question whether anything passed by deed to son; grant of estate to commence in future without intermediate estate; judgment for the defendant.	
LEGAN & VANSE vs. LATANY	R39
Action of ejectment; facts agreed; effect of devise in fee in one clause of will and conditional estate in subsequent clause; marriage of grantee and conveyance of land; death of grantee and devise by will; question whether first devisee had estate in fee or estate tail; held an estate in fee.	
LIGHTFOOT vs. LIGHTFOOT	R84
Bill in chancery; devise of land and personalty to son with gift to brother in case son dies without male issue; with provision in that event to daughter of son, or if none, then for testator's own daughter; personal estate insufficient to pay specific legacy; son dies in childhood; suit for account of personal estate and profits of land and negroes and for legacy and provision for daughter; decree for the defendant.	
MARKS vs. DUNN	R44
Action of ejectment; devise of lands to be sold; whether proceeds of sale are assets in ex'ors hands; title of the purchaser in such case, held purchaser takes the land but heir has remedy against ex'or if there were personal assets to pay the debts.	

TABLE OF CASES

R117

	Page
MARSTON <i>vs.</i> PARISH	R35
Action of detinue; bequest of negroes and other personalty to wife and children, with right of widow to keep children's shares until they came of age; negroes had children; widow marries; second husband bequeathes negroes to child of which wife supposed to be enceinte; residue of estate to wife; widow proved not to be with child and married a third time; detinue by heir of second husband for negroes; held that five of the six negroes sued for belonged to third husband, but plaintiff entitled to judgment for the one that belonged to second husband.	
McCARTY <i>vs.</i> FITZHUGH	R112
Bill in chancery; son-in-law indebted by bond in 200 <i>l</i> to father-in-law; latter lived at time bond given in Westmoreland Co., but afterwards moved to Stafford; by will gave all debts due to him in Stafford to his son and residue of his estate to his son-in-law and two other sons; bill by son to have proportionate part of his debt as residuary legatee; effect on debt of making the debtor an ex'or.; rule in equity; proof of intention.	
MEEKINS <i>vs.</i> BURWELL	R92.
Action of ejectment; construction of will; whether estate in fee simple or entailed.	
MEEKINS & VADIN <i>vs.</i> BURWELL <i>et als.</i>	R15
Appeal from County Court; action of ejectment; special verdict; in uncertainty preference given to fee simple estate; the estate in this case; judgment reversed.	
MUTLOW <i>vs.</i> BALLARD	R9
Action of case for slander; actionable words; the innuendo.	
NICHOLAS & UX <i>vs.</i> BURWELL EXR.	R102
Bill in chancery; gift to child with which wife was pregnant; conditions of gift; codicil; after born child lived but two months; widow remarried; bill for distributive share of legacy to posthumous child; bill dismissed by a divided court.	
POWELL <i>vs.</i> FARREL	R55
Appeal from County Court; action of ejectment and special verdict; judgment but no damages assessed; motion to set aside judgment, but it was affirmed.	
ROSS EXOR. <i>vs.</i> COOKE <i>et al.</i>	R42
Plea of infancy followed by plea in abatement; demurrer; (record illegible but see same case in Barradall's reports Post MSS. 128 there entitled <i>Rose Exor. Bagg vs. Cooke et als.</i> R. T. B.).	
SMITH <i>vs.</i> BROWN	R1
Action of trespass; property to be charged in declaration; goods damaged need not be valued; civil action lies although act complained of be also a felony.	
SWINEY <i>vs.</i> DANDRIDGE	R109
Bill in chancery; devise to wife and legacy to god-son; widow marries the boy who died under age; she sues for the legacy, but fails.	
THORNTON <i>vs.</i> BUCKNER	R30
Bill in chancery; title to land; issue out of chancery.	
THURSTON <i>vs.</i> PRATT	R63
Appeal from County Court; action of ejectment; the statute of limitations; effect of ouster and disseisin; coparceners.	
TUCKER <i>vs.</i> SWEENEY	R39
Appeal from County Court; increase of slaves after owner's death may be taken in execution for his debt.	

	Page
WAUGH vs. BOGG	R77
Appeal from County Court; action of <i>indebitatus assumpsit</i> ; pleas non assumpsit and statute of limitations; demurrer to second plea; writ of enquiry and damages assessed; objection that damages excessive and new writ asked and awarded; reversed on appeal.	
WAUGHOP vs. TATE	R76
Appeal from County Court; action of detinue; deed by infant for negroes and will same day not mentioning them; deed held good as a codicil to the will; an infant not being competent to make a deed but if eighteen years old competent to make a will. (Randolph had advised against this view and says "I believe any lawyer in the world would have given the same opinion.")	
WILLARD vs. PERRY	R72
Appeal from County Court; action of <i>indebitatus assumpsit</i> ; grant to man and his wife with restriction against sale of land without consent of grantor; indenture not sealed by wife and not recorded; wife devised the land during her life for yearly rent; original grantor entered and ousted lessee; question of the validity of the lease; wife sued for rent in County Court and judgment given her; on appeal reversed.	
WADDY vs. STURMAN <i>et al.</i>	R61
Bill in chancery; will of personal estate; exor. paid the debts and took negroes and increase as his own property without sale of them; the effect of the statute of limitations in equity; held that legatees to whom estate was delivered should be made parties to the bill.	

F
229
.82
v.1

3076 1

